IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 130.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, Appellants,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

No. 134.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Appellant.

vs.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREMOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, et al.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF FOR APPELLANTS IN NO. 130, AND FOR APPELLEES IN NO. 134.

SUPPLEMENTAL STATEMENT.

These cases, being appeal and cross appeal, were argued and submitted to this Honorable Court on October 13th, 1910.

The court after having same under consideration later, and in April, 1911, of its own motion, ordered same restored to the docket for re-argument.

These cases involve the constitutionality of what is known as the two-cent passenger fare law of Missouri, and certain maximum freight rate laws of the State, full text of which is set out in appellant's statement in the main brief. The appellee, in case number 130, the Chicago, Burlington & Quincy Railroad Company, contended that said passenger and freight rate laws were unconstitutional for two principal reasons. First, because the passenger and freight rate laws interfered with and were a direct burden upon interstate commerce, and therefore impinged upon the provisions of section 8, article 1 of the Constitution of the United States; and second, because the said passenger and freight rates named in said acts were confiscatory.

Judge Smith McPherson, before whom the cases were tried, found that the said passenger and freight rate laws did not interfere with and were not direct burdens upon interstate commerce. He found, however, that said passenger and freight rates did not afford appellee revenue sufficient to provide a reasonable return on the fair valuation of the property employed in rendering the service and were therefore confiscatory. He taxed one-half of the cost in the case against appellants and one-half of the costs against appellee.

Appellants in their brief of the case in this Honorable Court did not argue the question as to whether or not the passenger and freight rate laws interfered with and constituted a direct burden upon interstate commerce, because that question had been determined by the trial court in their favor, but confined their brief and argument entirely to the question as to whether or not the rates were confiscatory.

In this supplemental brief we will first present the views of appellants in support of the finding and decision of Judge

McPherson, that said passenger and freight rate laws do not interfere with and are not direct and substantial burdens upon interstate commerce; and second, to present, within a small compass, some further facts and figures why said freight and passenger rates are not confiscatory and to emphasize the fact that the complainant wholly failed to make the proof required by law.

PART I.

THE FREIGHT AND PASSENGER RATES INVOLVED ARE NOT VIOLATIVE OF SECTION 8, ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES (COMMERCE CLAUSE).

BRIEF AND ARGUMENT.

I.

THE TWO-CENT PASSENGER FARE ACT AND MAXIMUM FREIGHT RATE ACTS INVOLVED DO NOT INTERFERE WITH NOR CONSTITUTE A DIRECT AND SUBSTANTIAL BURDEN UPON INTERSTATE COMMERCE AND ARE NOT VIOLATIVE OF SECTION 8, ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

OURS IS A DUAL FORM OF GOVERNMENT. EACH STATE HAS THE SOLE AND EXCLUSIVE AUTHORITY TO PRESCRIBE REASONABLE MAXIMUM PASSENGER AND FREIGHT RATES ON TRAFFIC WHOLLY WITHIN THE STATE. IT IS A LEGAL IMPOSSIBILITY FOR STATE RATES ON INTRASTATE TRAFFIC TO CHANGE INTERSTATE RATES. IF, HOWEVER, IT WERE LEGALLY POSSIBLE FOR STATE RATES TO CHANGE OR INTERFERE WITH INTERSTATE RATES, IT IS NO OBJECTION TO THE VALIDITY OF SUCH LAWS THAT SUCH RATES INCIDENTALLY AFFECT INTERSTATE COMMERCE.

THE MERE RAISING OR LOWERING OF MAXIMUM PASSENGER OR FREIGHT RATES BY A STATE ON INTRASTATE COMMERCE CANNOT, AS A MATTER OF LAW, CHANGE INTERSTATE RATES. IT IS A LEGAL IMPOSSIBILITY. INTRASTATE AND INTERSTATE COMMERCE CONSTITUTE TWO SEPARATE, DISTINCT AND INDEPENDENT CLASSES, AND

THE RATES OF EACH ARE FIXED AND CONTROLLED BY SEPARATE SOVEREIGNTIES. THE CHANGE IN THE RATES OF ONE BY THE STATE AND IN THE OTHER BY FEDERAL AUTHORITY ONLY OPERATES UPON AND AFFECTS ITS OWN SEPARATE, DISTINCT AND INDEPENDENT CLASS OF COMMERCE.

THE ENFORCEMENT OF THE PASSENGER AND FRIGHT RATE ACTS IN QUESTION WOULD NOT, IN FACT, HAVE THE EFFECT OF DIRECTLY AND SUBSTANTIALLY BURDENING INTERSTATE COMMERCE.

THE LAW PRESUMES THE MISSOURI ACTS ARE VALID AND THAT INCLUDES THE PRESUMPTION THEY DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

A.

OURS IS A DUAL FORM OF GOVERNMENT.

The government of this country is conducted through two separate governmental functions or sovereignties, to wit, first, that of the Federal Government operating through the powers expressly given to it in the Constitution of the United States, including such other incidental powers as are necessary to carry into effect the powers granted; and second, that of the states operating by and through all the remaining powers and which were not granted to the Federal Government nor as a matter incident to the effective exercise of such granted powers. Thus, we have two governmental powers operating at the same time, in the same State, on the same persons and property, and each sovereign within its jurisdiction. The Constitution of the United States and the enactments of Congress thereunder are supreme in the Federal jurisdiction, and a State law affecting a Federal subject is void; on the other hand, a Federal law is void if it is made to apply to a subject or a right belonging to the jurisdiction of a state.

Howard vs. Illinois Central R. R. Co., 207 U. S. 463.
Sands vs. Manistee River Imp. Co., 123 U. S. l. c. 295.

This Honorable Court from the beginning has averted peril by keeping both the State government and the general government within their respective domains, and has thereby secured the harmonious operation of both. To uphold the integrity of the sovereign states, and at the same time preserve the rights and powers conferred by the Constitution upon the Federal Government. The general government has no more right to encroach upon the powers reserved in the states and not delegated to the Federal Government nor going as a matter incidental thereto, than the States have to invade those delegated to and resting in the Federal Government. (Sands vs. Manistee River Imp. Co., 123 U. S. l. c. 295). Both must be faithfully and consistently preserved and upheld to the end that good may come to both governments and the perpetuity of our institutions be guaranteed.

To break down the rights, powers and functions of the states is as dangerous in the end as to permit the states to ignore lines and invade the jurisdiction of the general government. This Honorable Court aptly expressed itself along these lines in the case of Baltimore & Ohio Railroad Company vs. Maryland, 88 U. S. l. c. 485, in the following language:

> "We are bound to sustain the constitutional powers and prerogatives of the states, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences."

This Honorable Court, to whom comes for final arbitrament all these vital questions, has throughout the years, held steadfast to this principle and has preserved the powers

of each of the two governments and has, in perfect harmony, driven them in tandem.

When the Constitution of the United States was written the commerce of the nation floated upon the bosom of her rivers, her harbors and the seas. When the Constitution was adopted the power of Congress to regulate commerce was applied principally to that commerce carried on by water traffic. This court in the case of Baltimore & Ohio Railroad Company vs. Maryland, 88 U. S. 1. c. 470, said:

> "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its languages and its spirit embrace commerce by land as well."

The court also said in the same case on the same page, that:

> "Commerce on land between the different states is so strikingly dissimilar in many respects from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal Governments."

And in the same case on the same page, the court also said:

> So that state interference with transportation by water and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country were not entirely subject both as to their construction, repair and main-

tenance to State regulation and control. They were all made either by the State or under its authority. The power of the State to impose or authorize such tolls, as it saw fit, was unquestioned.

"No one then supposed that the wagons of the country, which were the vehicles of this commerce or the horses by which they were drawn, were subject to national regulation."

As was stated in this case by the court, the movement of persons and merchandise so long as it is free to one person as another, so long as it is free to the citizens of other states as to the citizens of the state in which it is performed, is not regarded as unconstitutionally restricted by tolls exacted on the bridges and turnpikes, no matter whether they belonged to the State or to private citizens. So when the intrastate commerce found its way through the canals of the states, no amount of tolls which were exacted by the states or the companies owning them was ever regarded as an infringment of the *commerce clause* of the Federal Constitution. The court in the case of Railroad Company vs. Maryland, supra, said further that after the discoveries of mechanical science had brought to the nation rapid transit through the railroads it was not imagined nor contended that the states might not exact any amount whatever of tolls or fares on freight, or authorize its citizens or corporations if owners so to do, and in so doing they would not impinge upon the *commerce clause* of the Federal Constitution.

One of the methods resorted to for the construction of constitutional provisions is to ascertain the then existing evils. When the commerce clause of the Constitution was adopted, New York and other seacoast states placed *burdens* on commerce from inland points to seacoast points and across such states for shipment by water. It was *burdens* on commerce

that the inland localities complained of and that such *burdens* should not be imposed was the reason for the adoption of the *commerce clause*. If there had been no such *burdens* there would have been no *commerce clause* in the Constitution of the United States. After the adoption of the Constitution as the interstate and intrastate traffic upon land was carried on and conducted by wagon trains and by coaches, there was no trouble nor question raised as to the undoubted right of a state to name the tolls or rates to be charged in intrastate traffic on the one hand, providing of course, they were not confiscatory, and the right of the Federal Government as to its absolute control over interstate commerce on the other.

As the country grew and as American inventive genius transferred the commerce of the nation from the coach and the wagon, and from the waterways to a great system of railroads, it was not necessary to evolve any new legal principles to meet the conditions, but it was sufficient, to simply apply the constitutional provisions and well established principles of law to meet the new conditions. The courts cannot pare the rights of the states on the one hand nor add to the jurisdiction of the Federal Goverment upon the other. The march of time has not changed the shore line that divides the prerogatives of the Federal Government from those of the states. Nothing has been lost by erosion, nothing has been gained by accretion.

As was said by this Honorable Court in the case of in re Debbs, 158 U. S. 564.

> Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon and on water by canal boat and sailing vessel, yet, in its

actual operation it touches and regulates transportation by modes then unknown, the railroad train and steamship. Just so is it with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new mode of such commerce which the future may develop."

In the final analysis, then, we have two sovereign powers constantly in operation in each state, the powers of each being distinct and the two together constituting a complete government. The Federal Government exercises generally the powers which affect the people of all the states alike (Cardwell vs. Bridge Co., 113 U. S. 210), while the states exercise the powers that are local or domestic in their application, and the extent of the jurisdiction of these two separate sovereignties was firmly fixed by the people in the adoption of the Constitution of the United States.

B.

EACH STATE HAS THE SOLE AND EXCLUSIVE AUTHORITY TO PRESCRIBE REASONABLE MAXIMUM PASSENGER AND FREIGHT RATES ON TRAFFIC WHOLLY WITHIN THE STATE. IT IS A LEGAL IMPOSSIBILITY FOR STATE RATES ON INTRASTATE TRAFFIC TO CHANGE INTERSTATE RATES. IF, HOWEVER, IT WERE LEGALLY POSSIBLE FOR STATE RATES TO CHANGE OR INTERFERE WITH INTERSTATE RATES, IT IS NO OBJECTION TO THE VALIDITY OF SUCH LAWS THAT SUCH RATES INCIDENTALLY AFFECT INTERSTATE COMMERCE.

Commerce is by virtue of the provisions of the Constitution of the United States divided into two principal classes, to wit, interstate and intrastate, or in other words, commerce among the states and commerce wholly within the states.

The exclusive power to exercise control over and to regulate interstate commerce is unquestionably and completely lodged in the National Government by virtue of the constitutional grant of power. On the other hand, the states exercise control just as absolutely and completely over intrastate commerce (123 U. S. l. c. 295), same being the commerce wholly within the states, and does so by virtue of their reserved and inherent police power.

Congress has no power of regulation nor control over the internal commerce and trade of a state. The Federal Government cannot fix or regulate the rates on commerce wholly within the State, neither can the State fix or regulate the rates on interstate commerce. The action of Congress in the one instance and the action of the legislature of a state in the other instance would be invalid. The power and authority of each sovereignty is exclusive within its jurisdiction and has

been repeatedly held so by this court. The Federal Employers' Liability Law was held void because it applied to employes of railroads while engaged in intrastate commerce, that being a subject over which the Federal Government had no jurisdiction. (Howard vs. Illinois Central Railroad Co., 207 U. S. 463.)

In the case of Covington Bridge Co. vs. Kentucky, 154 U. S. 204, the Supreme Court of the United States held that the power of the state is exclusive over that branch of commerce within its jurisdiction, and the power of the Federal Government exclusive over interstate commerce.

That if the states in fixing rates and tolls for passenger and freight traffic wholly within the State, fix rates that incidentally or indirectly affect interstate commerce, it would be no objection to the validity of the State legislation.

In support of these principles we present to this Honorable Court various extracts from its opinions. In the case of the Covington & Cincinnati Bridge Co. vs. Commonwealth of Kentucky, 154 U. S. l. c. 209, the court said:

> "The adjudication of this court, with respect to powers of the State over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the State may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.
>
> "The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the states, and while the regulation of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in

any just sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways and canals between points in the same state and regulate the tolls for the use of same."

In the same case and on page 210, the court said:

"Congress has no power to interfere with police regulations relating exclusively to the internal trade of the State, nor can it by exacting a tax for carrying on a certain business, thereby authorize such business to be carried on within the limits of a state. License tax cases, 5 Wall. 462, 470, 471. The remarks of the chief justice in this case contain the substance of the whole doctrine: 'Over this (the internal), commerce and trade, Congress has no power of regulation nor any direct control. This power belongs exclusively to the state.'"

The court, in the same opinion on page 213, said:

"The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in Munn vs. Illinois, 94 U. S. 113, in which a power was conceded to the state which prescribed regulations and fixed the charges of elevators used for the reception, storage and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states. The decision was put upon the ground that elevators were property 'affected with a public interest,' and that from time immemorial in England and in this country from its first colonization it had been cus-

> tomary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing, to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold."

The court in the same opinion on page 214, and in passing upon the rights of a state to establish reasonable maximum rates for the transportation of freight and passengers within the State, said:

> "The next case, namely, that of the Chicago, Burlington & Quincy Railroad vs. Iowa, 94 U. S. 155, 163, a bill was filed by the Chicago, Burlington & Quincy R. R. Co., an Illinois corporation, to restrain the prosecution of suits against it under 'an act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this State.' The complainant was also the lessee of the Burlington & Missouri Railroad in Iowa, the two roads being connected by a bridge which crossed the Mississippi river at Burlington, thus making a continuous railroad from Chicago to Plattsmouth on the Missouri river in Iowa. The case was held to be covered by Munn vs. Illinois, the road, like the warehouse in that case, being situated within the limits of a single state. 'Its business,' said the chief justice, 'is carried on there, and its regulation is a matter of domestic concern.'"

In speaking to the question as to the power of a state to limit railroad charges for transportation within its own jurisdiction, this court, in the case of Stone vs. Farmer Loan and Trust Co., 116 U. S. l. c. 325, said:

> "It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter or unless what is done amounts to a regulation of foreign or interstate commerce."

And on page 334 of the same decision, the court said:

> "It may, beyond all question by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi."

As the Federal Government cannot legislate for the states, it is entirely clear that the provisions of the interstate commerce act forbidding *discriminations* between localities, etc., apply only to discriminations in *interstate commerce,* and do not and could not condemn as *"discrimination"* difference between interstate and intrastate rates from given distributing centers to border stations inside and outside the State boundary. If a state has any power over its domestic commerce, it is clear that that power cannot be limited or affected by a Federal law. If intrastate rates to any given point must be the same as interstate rates to competing points outside the State, then it is evident that the State possesses no commerce power, and the decisions of this Honorable Court heretofore are all amiss. But the State can prescribe reasonable maximum rates on intrastate traffic beyond question.

Northern Pacific Ry. Co. vs. North Dakota, 216 U. S. 579.

In sustaining the clause in the Constitution of the state of Kentucky, prohibiting a greater charge for a shorter than a longer haul within the state, and in holding that such a provision by reason of its remote and indirect effect was not an interference with interstate commerce, this court, in 183 U. S. l. c. page 518, said:

> "The final contention that section 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void need not detain us long.
>
> "It is plain that the provision in question does not in turn embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad lying within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.
>
> "It may be that the enforcement of the State regulation forbidding discrimination of rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful, must be direct and not the merely incidental effect of enforcing the police powers of a State."

To the same effect is New York ex rel. vs. Hasterberg, 211 U. S. l. c. 41 and 42.

In the case of New York, Lake Erie & Western Railroad Co. vs. Commonwealth of Pennsylvania, 158 U. S. l. c. 439, the Court said:

> "The interference with the commercial power must be direct and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."

And on page 437, of the same opinion, the court said:

> "We have frequently had occasion to show that the existence of Federal supervision over interstate commerce and the subsequent obligation upon the Federal courts to protect that right of control from encroachment on the part of the State, are not inconsistent with the power of each State to control its own internal commerce."

In affirming the right of a State to control the rates as to freight and passenger fares wholly within the State, in the case of Chicago, Burlington & Quincy Railroad Co. vs. Cutts, 94 U. S., p. 155, the court said:

> "The objection that the statute complained of is void because it amounts to a regulation of commerce among the states has been sufficiently considered in the case of Munn vs. Illinois. This road like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there and its regulation is a matter of domestic concern."

In sustaining the constitutionality of an act of the Legislature of Wisconsin providing for a maximum of charges to

be made by the Chicago & Northwestern Railroad Company for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it or taken up inside and carried without, this court, in the case of Peik vs. Chicago & Northwestern Ry. Co., 94 U. S., p. 164, said:

> "In Munn vs. Illinois (Ante 77) and Railroad Co. vs. Iowa (Ante 94) we have just decided that the State may limit the amount of charges by a railroad company for fares and freight, unless restrained by some contract in the charter. * * * So far, this case is disposed of by those decisions."

In the case of Reagin vs. Mercantile Trust Co., 154 U. S. 413, the question arose whether the Texas & Pacific Ry. Co., a corporation organized under an act of Congress was subject to the laws of Texas with respect to rates for transportion wholly within that State. This court, on page 416, said:

> "By the act of incorporation Congress authorized the company to build this road through the State of Texas. It knew that when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given Congress. * * * We are of the opinion that the Texas & Pacific Ry. Co. is, as to business done wholly within the State, subject to the control of the State in all matters of taxation, rates and other police regulations."

This case was quoted approvingly in the case of Smyth vs. Ames, 169 U. S. 1. c. 520. This court, in the case of

Smyth vs. Ames, supra, in discussing the Nebraska statute, on page 522, said:

> "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of a State."

In the Smyth vs. Ames case it became necessary to interpret the act of July 1st, 1862, relating to the Union Pacific Railway Company, a company organized for the purpose of consolidating several railroads under the authority and acts of Congress. The court, on page 522, said:

> "A question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass. * * * We do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory."

In the case of Houston & Texas Central Ry. Co. vs. Mayes, passing upon the Texas statutes providing penalties for failure to furnish cars to shippers, 201 U. S., page 328, the court said:

> "As the power to build and operate railways and to acquire land by condemnation, usually rests upon the State authorities, the Legislature may annex such conditions as they please with regard to intrastate transportation and such other rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed."

In discussing the Federal Employers' Liability Law this court, in the case of Howard vs. Illinois Central Railroad Company, 207 U. S., at page 502, said:

> "It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local would obliterate all the limitations of power imposed by the Constitution and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

The court held said Employers' Liability Act unconstitutional, because it applied to railroads while engaged in intrastate commerce, that being a subject over which, the court said, the Federal sovereignty had no jurisdiction.

In the case of Ames vs. Union Pacific Ry. Co., 64 Fed. 171, involving the Nebraska Freight Rate Law, Mr. Justice Brewer, sitting at circuit, in the case, said:

> "It is true that the companies may for their own convenience, to secure business, or for any

other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the states does not work a change in interstate rates any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effect of competition between themselves and other companies, *in restraint of the otherwise undeniable power of the State.*"

It is evident, upon a moment's reflection, *that the reduction of state rates on intrastate traffic cannot as a matter of law, change interstate rates. It is an impossibility.*

The two classes of rates and traffic are separate, distinct and independent, and the raising or lowering of one cannot affect the other. The lowering of one works no *legal compulsion* on the roads to change the other, and the roads cannot plead their own convenience or business reasons or the effect of competition between themselves in restraint of the otherwise undeniable power of the State.

Ames vs. Union Pacific Ry. Co., 64 Fed. 171.

Oregon R. and Navigation Co. vs. Campbell, 173 Fed. l. c. 978 to 988.

Woodside vs. Tonopah & G. R. Co., 174 Fed. l. c. 360.

Louisville & N. R. Co. vs. Siler, 186 Fed. l. c. 198.

In re Arkansas Rate Cases, 187 Fed. l. c. 296.

Saunders vs. Southern Express Co., 18 Interst. Com. Com'n R. 415, 421.

Hope Cotton Oil Co. vs. Texas & Pacific, 12 Interst. Com. Com'n R., 265, 269.

Gibbons vs. Ogden, 9 Wheat. 194.

Employers' Liability Cases, 207 U. S. 463.

Wabash Ry Co. vs. Ill., 118 U. S. 557, 565.

Chicago, etc. Ry. Co. vs. Minn., 134 U. S. 418, 459.

Northern Securities Co. vs. United States, 193 U. S. 197, 350.

Mo. Pac. Ry. Co. vs. Kansas, 216 U. S. 262, 283, 284.

In the case of Sands vs. Manistee River Improvement Company, 123 U. S. l. c. 295, this court held that the internal commerce of a State is as much under the control of the State as interstate commerce is under the control of the Federal Government. Following is the language of the court:

> "The internal commerce of a State, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the general government."

In the case of Louisville & N. R. Co. vs. Eubank, 184 U. S. l. c. 42, the late Mr. Justice Peckham, in answering an assumed case, said:

> "In thus fixing the interstate rate, Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and on the other hand, the State, by such a statute, regulates the local rate, but that it has the right to do. Congress does not directly or indirectly interfere with local rates by adopting their interstate rate."

In the case of Atlantic Coast Line Railroad Company vs. North Carolina Corporation Commission, 206 U. S. 1,

speaking through Mr. Justice White, now Chief Justice, the court said:

> "The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public has in their operations, are subject as to their State business, to State regulations, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

In the case of Missouri Pacific Ry. Co. vs. Kansas ex rel. Taylor, 216 U. S., at page 283, the court, in discussing the claim of the company that the order of the commission was void because it operated as a direct burden upon interstate commerce, said:

> "To support this proposition it is alleged that the charter of the interstate railroad company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and, therefore, an interstate railroad. This being its character, the argument proceeds to assert that the traffic on the road, whatever be the nature of the traffic, was interstate commerce and beyond the control of the state of Kansas. But this simply confounds the distinction between state control over local traffic and Federal control over interstate traffic. *To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless at the same time it were held that the incorporation of the road had*

operated to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the Constitution of the United States. Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and, therefore, did not destroy the power of Kansas over its domestic commerce or operate to bring under the sway of the United States matters of local concern; and, of course, could not project the authority of Kansas beyond its own jurisdiction. The charter, therefore, left the road for which it provided subject, as to its purely local or State business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate business was concerned, to the controlling power conferred by the Constitution upon the government of the United States."

* * * * * * * *

"The order cannot be said to be an unreasonable exertion of authority because the power exercised was made operative to the limit of the right to do so. * * * It is said, that as a State line may be but a mere cornfield, and great expense must result to the railroad to establish necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the State line, but twenty miles beyond, to Butler, on the Joplin line, where terminal facilities exist. * * * * But under the hypothesis upon which the contention rests, the operation of the train to

Butler would be at the mere election of the corporation; and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a *direct* burden on interstate commerce would be imposed."

DEDUCTIONS.

From these decisions it is conclusively settled that a state has the exclusive authority to regulate and control intrastate commerce, including rates and tolls therefor, and that it is equally well settled that should the laws of the State in controlling and regulating its intrastate commerce incidentally affect interstate commerce, that fact would in nowise affect the validity of such laws. In exercising the State's commerce power over the intrastate *rates*, it is not exempted, however, from the limitations of the *fourteenth amendment to the Federal Constitution as to confiscation, etc.* The *amount* named as to such *rates* has nothing to do with, and has never been regarded as an infringement upon the *commerce clause* of the Federal Constitution.

As to the regulation of commerce and the fixing of transportation rates, the boundaries of the states cannot be disregarded. They limit the jurisdictions of the two distinct sovereignties, each having the exclusive power of control over a distinct part of the subject. To disregard state lines in rate regulation is to disregard state authority (the only authority there can be), over intrastate commerce. To disregard state lines leaves intrastate rates subject to no control by any power, because the Federal Government is without authority to legislate thereon.

The Federal and State laws on the subject of rates are in exact harmony with the Constitution. The interstate commerce act declares that the *provisions* thereof shall not apply

to the transportation of passengers or property, or to the receiving, delivering, storing or handling of property *"wholly within one state, and not shipped to or from a foreign country, from or to any state or territory,"* and the Missouri acts in question specifically provide that the laws apply only to business, both freight and passenger, beginning and ending in this State. None of the laws involved require the carrier to do, or refrain from doing, anything with reference to the class of business subject to the jurisdiction of the other sovereignty. No question can be raised by a State as to the reasonableness of interstate rates, and no Federal question can be raised concerning intrastate rates, unless the rates are in and of themselves as applied to the intrastate business *confiscatory*, and this question does not arise under *section* 8, *article* I of the Constitution of the United States, but under the *fourteenth amendment*. The maximum rates as to each class of commerce are separately fixed and separately controlled. The Federal Government has no control over the State rates, except that they may be declared invalid if confiscatory, and the State has no control over the interstate rates. Neither can the two kinds of commerce be consolidated and regulated together by any public authority or power. The court said in the case of Hanley vs. Kansas City Southern Railway Co., 187 U. S. l. c. 620: *"There can be but one rate fixed by but one authority, whether that authority be the State or Congress."* If this were not so, then the constitutional diverse jurisdiction over the subjects would be destroyed. Neither can the chance location of cities and towns in this or other states destroy or affect the police power of Missouri.

C.

THE MERE RAISING OR LOWERING OF MAXIMUM PASSENGER OR FREIGHT RATES BY A STATE ON INTRASTATE COMMERCE CANNOT, AS A MATTER OF LAW, CHANGE INTERSTATE RATES. IT IS A LEGAL IMPOSSIBILITY. INTRASTATE AND INTERSTATE COMMERCE CONSTITUTE TWO SEPARATE, DISTINCT AND INDEPENDENT CLASSES, AND THE RATES OF EACH ARE FIXED AND CONTROLLED BY SEPARATE SOVEREIGNTIES. THE CHANGE IN THE RATES OF ONE BY THE STATE AND IN THE OTHER BY FEDERAL AUTHORITY ONLY OPERATES UPON AND AFFECTS ITS OWN SEPARATE, DISTINCT AND INDEPENDENT CLASS OF COMMERCE.

A State can tax the instruments of interstate commerce as other property of like description is taxed (Covington & Cincinnati Bridge Co. vs. Ky., 154 U. S. l. c. 212; Louisville & Nashville R. R. Co. vs. Ky., 161 U. S. l. c. 701), but the State cannot tax such commerce itself. And where the health, life and safety of the citizens of a State may be involved, the State may legislate as to these instruments of interstate commerce (Louisville & Nashville Ry. Co. vs. Ky., 161 U. S. l. c. 701, 702).

While a State has the exclusive power to *regulate* intrastate commerce, yet in exercising that right it must not do so in such a *way* as to directly and substantially burden interstate commerce. The right of the State to *regulate and control* its intrastate commerce is absolute, but the *way* in which the right is to be exercised is limited by the injunction that it must not be such a way as will directly burden interstate commerce, just as the Federal Government is enjoined from exercising *its* right to regulate and control in-

terstate commerce in such a way as to interfere with intrastate commerce. (Howard vs. Ill. Central R. R. Co., 207 U. S. 463.) That the State in exercising such absolute right should do so in a way which incidentally affects interstate commerce does not affect its validity.

The mere fixing, raising or lowering of maximum passenger or freight rates on intrastate commerce can in no way change or affect interstate rates, as in law, it is an impossibility. The law merely prescribing maximum rates on intrastate traffic, must not be confused with laws *purely regulatory* of the commerce and the instruments thereof. Laws simply naming *maximum rates,* on a Federal question, are measured solely by the *Fourteenth Amendment,* and the other class of laws by the *commerce clause.*

This was tersely stated by the late Mr. Justice Brewer in Ames vs. Union Pacific Ry. Co. (C. C.) 64 Fed. 172, in the following language:

> "Again, it is insisted that this act interferes with interstate commerce in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and, in the second place, by reducing local rates, it necessarily reduces rates on interstate business. Neither of these objections seems to me to be well taken. * * * To say, for instance, that because *railroad companies* have *voluntarily* placed flour in a certain class, on which a specified rate is to be charged, such *voluntary act of mere classification destroys the power of the State to establish a classification which puts flour in another class, and subject to another charge, is, to my mind, a most extravagant pretension.* Neither can I understand how the *reduction of local rates, as a matter of law,* interferes with interstate rates. It is true that the companies may, for their

> own convenience, to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute, but surely there is no *legal compulsion.* The statute of the State does not work a change in interstate rates any more than an act of Congress prescribing interstate rates would legally work a change in *local rates.* Railroad companies cannot plead their own convenience, or the effect of competition between themselves and other companies, *in restraint of the otherwise undeniable power of the State.*"

In the case of Woodside vs. Tonopah & G. R. Co. et al., 184 Fed. l. c. 360, before Morrow, Circuit Judge, and Farrington and Van Fleet, district judges, the court said:

> "A rate fixed by a State railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield. This we think is a complete answer to the allegation of the bill in the Southern Pacific case."

This position is ably supported by the court in the case of Oregon R. and Navigation Co., vs. Campbell 183 Fed. l. c. 979. The court reasoned as follows:

> "So it is that the National Constitution is wholly a delegation of power, and the State Constitution a restriction or limitation of power; and the State Legislatures may exercise all the reserved powers, save those which the people have withheld, it

follows, very naturally and logically, from these premises, that the National Government is without power and authority to legislate or to supervise or control in any manner the movement of commerce which is entirely within a state, or that which is appropriately termed intrastate, as distinguished from interstate commerce. This arises simply from the want of power, the lack of delegation of power, to legislate touching that class of commerce. Upon the other hand, the sole power for the regulation of intrastate commerce rests with the State Legislatures. Congress has expressly recognized this distinction of powers in the passage of the act to regulate commerce of February 4, 1887. I Supp. Rev. St., p. 529. The act declares that the provisions thereof "shall not apply to the transportation of passengers or property, or to the receiving, delivering storage or handling of property, wholly within one state." So it has been pertinently observed by Mr. Justice Harlan, in Interstate Commerce Commission v. Brimson, supra, to the same effect."

On page 985 in the same case, the court said:

"So, if it be that the local state rates, as fixed and regulated by the State Railroad Commission on these commodities, unsettle in some way previously fixed trans-continental or interstate rates, that circumstance does not render the State rates invalid as an interference with interstate commerce. Let it be supposed that the State was the precursor in making rates for the transportation of purely intrastate commerce, there could, then, at that juncture, be no conflict. Could it be contended that the State rate

was invalid, because connecting railroads might desire to establish a transcontinental rate in combination with a local rate, also of their own making, which would conflict with the State rate? If so, the fixing of a State rate would be a precarious and evanescent thing, to be dissipated at the caprice of the transportation companies, and the general government would usurp, in practical effect, the functions of the State government in the regulation of intrastate commerce. Such was not the purpose of the framers of the Federal Constitution. Nor was it the purpose of Congress itself in the adoption of the interstate commerce act, wherein was recognized, as has been noted before, the right of the State to regulate commerce wholly within its borders. The bill, therefore, in my opinion, states nothing that renders either the State railroad commission act or the order of the commission in conflict with the commerce clause of the Federal Constitution. This conclusion is borne out by the decisions of the Supreme Court.

"In Wabash, St. Louis & Pacific Railway Co. vs. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, the court says:

" 'For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as

this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provisions concerning commerce among the states. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other.'

"So in Smyth vs. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the court says:

" 'It cannot be doubted that the making of rates for transportation by railroad companies along public highways, between points wholly within the limits of a state, is a subject primarily within the control of that state.

"The case of Gulf, Colorado and Santa Fe Railway Company vs. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, is highly instructive and is indicative of how the Supreme Court maintains the prerogative of the State government to regulate commerce within its borders. In this case a quantity of corn had been purchased in Hudson, S. D., for delivery at Goldthwaite, Texas. However, in the course of the dealings between the parties concerned,

the corn was billed to Texarkana, Tex. It remained in that place some five or six days, and was reconsigned from Texarkana to Goldthwaite, Tex. The court says:

'The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment.'

And it was determined that it was not. The shipment was, therefore, as between the points named, intrastate, and subject to state regulations. There previously existed a through interstate rate from Hudson, S. D., to Goldthwaite, Tex., but this did not deter the court from adjudging the carriage, under the circumstances recited, to be of intrastate commerce. See, also, the Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 999, Sands vs. Manistee River Improvement Company, 123 U. S. 288, 295, 8 Sup. Ct. 113, 31 L. Ed. 149; and General Oil Co. v. Crain, 209 U. S. 211, 28 Supt. Ct. 475, 52 L. Ed. 754. This last case is further instructive as to when an interstate shipment ceases to be an interstate commerce. These authorities I deem to be decisive of the controversy.

"Nor does the case of Louisville & Nashville Railroad Co. v. Eubank, 184 U. S. 27, 22 Supt. Ct. 227, 46 L. Ed. 416, hold to a different view. It is rather illustrative of the same principal. The railroad had established a rate for the transportation of tobacco from Nashville, Tenn., to Louisville, Ky., at 12 cents per 100 pounds. The rate was so fixed, presumably, on account of water competition between the same points. It had also established a rate from Franklin, Ky., to Louisville, of 25 cents per

100 pounds. The road from Nashville to Louisville ran through Franklin. Eubank shipped large quantities of tobacco from Franklin to Louisville, and paid the established rate, but subsequently sued the railroad company to recover back the excess between 12 cents and 25 cents per 100 pounds. This is the case that came to the Supreme Court. The theory upon which the suit was instituted was that the alleged overcharges was unlawful because the State of Kentucky, by its Constitution, had declared it so to charge more for a shorter than for a longer haul over the same line, under substantially similar circumstances and conditions. The circuit court of the state, from the judgment of which error was prosecuted to the Supreme Court, held, construing this Constitution, that it applied as well to carriage from without the State to points within. Thus construed, the Supreme Court held that the effect of the clause in question in the Kentucky Constitution was to regulate interstate commerce, and hence the judgment of the Kentucky court was reversed. In deciding the case, the court says:

" 'The vice of the provision lies in the regulation of the rates between points wholly within the State, by the rates which obtain between points outside of and those which are within the State. * * * But the fact which vitiates the provision is, that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which

power of regulation the Constitution of the United States gives to the Federal Congress.'

"Elsewhere, the court says:

'We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may be thereby to a certain extent, directly regulated, and in that event the effect of the provision is direct and important, and not a mere incident.'

It should be noted that this same clause in the Kentucky Constitution had been previously held by the Supreme Court of the United States (Louisville & Nashville Railroad Co. vs. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298), as applied to places, all of which are wholly within the state, to violate no provision of the Federal Constitution, and it was only because an inferior court of Kentucky had put the construction upon the Kentucky Constitution as above indicated, that the clause was here held to be inimical to the commerce clause of the Federal Constitution.

"Neither does the case of Hall vs. DeCuir, 95 U. S. 485, 24 L. Ed. 547, militate against the principle here applicable. The controversy there, was con-

cerning a statute of the state of Louisiana, which required common carriers of passengers to extend to all persons, without regard to race or color, equal accommodations, rights and privileges, and the decision of the court proceeded upon the hypothesis that the statute necessarily and directly affected interstate traffic. Mr. Chief Justice Waite says:

> " 'But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within.'
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> "The cases of Swift & Co. vs. U. S., 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, and Loewe vs. Lawler, 208 U. S. 274, 28 Supt. Ct. 301, 52 L. Ed. 488, are concerning unlawful combinations in restraint of trade, which affected not only trade relations within a single state, but such relations also between the states, and hence lack applicability here."

In the case of Louisville & Nashville Railroad Co. vs. Siler, 186 Fed. l. c. 198, before Warrington, circuit judge, and Sanford and Denison, district judges, our position is further sustained. In discussing the subject, the court said:

> "Can it be that such combining and filing of local rates as interstate rates remove such local rates

altogether from the jurisdiction of the state for purely state purposes?

"Surely Congress did not intend, by the interstate commerce acts, that interstate rates, made and filed as plaintiff's have been, should thereafter operate, not merely as interstate rates, but also as intrastate rates. To say that Congress so meant is to ascribe to that body the purpose to take over to itself the whole rate-making power, both Federal and state. The only theory upon which such a claim can be urged is that Congress has provided that interstate rates shall be filed with the Interstate Commerce Commission, and shall not thereafter be changed, except in a prescribed time and manner; and so the rates thus filed amount to an adoption by Congress or its commission, in the sense that the rates exist and must be enforced as Federal-made rates. But it is expressly provided in each of the interstate commerce acts, that the act shall not apply to the transportation of passengers or property 'wholly within one state, and not shipped to or from a foreign country from or to any state or territory.' Act Feb. 4, 1887, c. 104, paragraph 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154); act June 29, 1906, c. 3591, paragraph 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149); Act June 18, 1910; c. 309, paragraph 6, 36 Stat. 544. Moreover, although the interstate rates of complainant from Jeffersonville, Ind. or from Cincinnati, Ohio to Bardstown, Ky., are the same as the rates charged from Louisville, Covington and Newport, Ky., still complainant's adherence to its interstate rates, and its observance of the new local rates in dispute, would not, under the interstate commerce act, be

regarded as an intent to discriminate against localities like Jeffersonville or Cincinnati. Saunders vs. Southern Express Co., 18 Interst. Com. Com'n R., 415, 421. Again, the state-made rates are not regarded by the Interstate Commerce Commission as binding 'as a necessary measure of the interstate rate.' Saunders v. Southern Express Co., supra (421); Hope Cotton Oil Co. vs. Tex. & Pac. Ry. Co., 12 Interst. Com. Com'n R. 265, 269. Conversely, under these decisions it is difficult to see why the State should be bound to adopt interstate rates; for, although the Federal power is supreme respecting interstate rates, that would leave the state with no power at all in regard to local rates.

"What is claimed, is that conditions existing in Kentucky do not warrant a greater charge for the carriage of freight within Kentucky as interstate freight than for the carriage of purely local freight; and the averment that the company will make a reduction of its interstate rates to correspond with the rates in dispute, states nothing more than that it will do this for strictly business reasons. The question, then, comes at last to this: 'Whether a business or economic policy of a railroad company, as distinguished from a legal duty, to change its interstate rates to correspond with just and reasonable local rates imposed by the state for the transportation of traffic originating and ending wholly within the state, can be said to be a direct, and not merely an indirect, effect of the state's action. Thus, in distinguishing direct from indirect effect, can such conditions be made the basis of a presumption of fact, equivalent to a rule of law, such as a Federal statute forbidding interstate rates from exceeding

the sum of the local rates between given interstate points? One difference between such presumption and rule is the uncertainty whether the railroad company in the end, at its election, will not decline to yield to the conditions created by the two sets of rates—interstate and local rates—and so defeat any presumption of fact that might be indulged in its favor by the courts, while the rule of law may always be certainly enforced through judicial decision. Another difference is that any election by the company to change the interstate rates would seem to be an intervening cause, and consequently render such change an indirect result. Without deciding whether there may be facts attending the administration of a state law which show a result so inevitable, for business reasons, that the result should be held to be the direct effect of the law, though not specified in the law, yet as applied to this case the fallacy of ascribing equality to the presumption of fact and rule of law in both conclusive and permanent effect may, we think, be further tested by the consequences. The logic of the company's argument would release its local rates from governmental regulations altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that, so far as rate-making is concerned, the State Railroad Commission would have no reason to exist, and State regulation of State rates would become simply historic. Before accepting such a doctrine, let us briefly recall the views of the court of last resort touching the power of the state to regulate commerce carried on exclusively within its borders.

"In Gibbons v. Ogden, 9 Wheat. 1, 194, 6 L. Ed. 23, Chief Justice Marshall, after defining the meaning of the words of the commerce clause, said:

" 'It is not intended to say that those words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or effect other states.'

"This rule has ever been recognized as sound. As late as the decision rendered in the Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, Mr. Justice White, in announcing the opinion of the court, accepted the doctrine, both as to the United States and the states, as laid down by Chief Justice Marshall in Gibbons vs. Ogden. After setting out the rule concerning the power of the United States, he said (207 U. S. 493, 28 Sup. Ct. 143 (52 L. Ed. 297):

" 'Accepting, as we now do and as has always been done, this comprehensive statement of the power of Congress, we also adopt and reiterate the perspicious statement made in the same case (9 Wheat. 194 (6 L. Ed. 23), of those matters of state control which are not embraced in the grant of authority to Congress to regulate commerce' (setting out the portion of the decision in Gibbons vs. Ogden, above quoted).

"We may call attention, also, to the language of Justice Miller in Wabash, etc., Ry. Co. vs. Illinois, 118 U. S. 557, 565, 7 Sup. Ct. 4, 30 L. Ed. 244; also of the same learned justice in Chicago, etc. Ry. Co. vs. Minnesota, 134 U. S. 419, 459, 10 Sup. Ct. 462, 703, 33 L. Ed. 970. 'In regard to the business

of common carriers limited to points within a single state, that state has the legislative power to establish the rates of compensation for such carriage;' and, also, the language of Mr. Justice Harlan in Northern Securities Co. v. United States, 193 U. S. 197, 350, 24 Sup. Ct. 436, 48 L. Ed. 679.

"Must this long-established power be now so construed as to eliminate the local rate-making power? We have seen that Congress has not so enacted. It has expressly provided that it shall not be. True, that body has not recognized and right in a state directly to hamper or burden interstate commerce; and all courts recognize the supremecy of the Federal power to regulate commerce among the states. Whether Congress has the power to forbid indirect interference with commerce among the states we need not consider; for we do not discover any attempt on its part to exercise such a power. We may now turn to the consideration of some decisions which we think present features of analogy to the present question.

"In Louisville & Nashville R. Co. vs. Eubank, 184 U. S. 27, 33, 22 Sup. Ct. 277, 279 (46 L. Ed. 416), the validity of section 218 of the Constitution of Kentucky was reaffirmed by the Supreme Court:

" 'We have already held in the case of Louisville & Nashville Railroad Company vs. Kentucky, 183 U. S. 503, 518 (22 Sup. Ct. 95, 46 L. Ed. 298), that the section of the Kentucky Constitution above set forth, as applied to places all of which are within the state, violates no provision of the Federal Constitution.' "

In the case of St. Louis Southwestern Railway Company vs. Allen, et al., Board of Railroad Commissioners of

Arkansas, 187 Fed. l. c. 295, our position is further sustained. Judge Trieber, in discussing the subject, said:

> "But does the fact that these intrastate rates bear such relation to interstate rates necessarily make the statutes of a state regulating charges for intrastate transportation by carriers engaged in interstate as well as intrastate commerce void? No authorities directly sustaining this claim have been cited to the court, although the cases in which statutes of this nature have been attacked are numerous. The only cases cited are those holding in general terms that state statutes which amount to some regulation of foreign or interstate commerce, or which directly or by their necessary operation burden interstate commerce, are invalid, as violative of the commerce clause of the National Constitution. On the other hand, Mr. Justice Brewer, in Ames vs. Union Pacific Ry. Co. (C. C.), 64 Fed. 165, 172, affirmed sub nomine Smyth vs. Ames, 169 U. S. 466, 18 Supt. Ct. 418, 42 L. Ed. 819, expressly held:
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> " 'Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. * * * * * The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates will legally work a change in local rates.'
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> "Louisville & Nashville Ry. Co. v. Eubank, 184 U. S. 27, 22, Sup. Ct., 277, 46 L. Ed. 416, cited for complainants, is not in point, as all that was decided in that case was that a state cannot compel carriers to adjust their intrastate rates with reference to their interstate rates."

And again on page 297 of said opinion, Judge Trieber said:

> "The right of every sovereign state to regulate public service corporations and the rates to be charged by them, subject to the provisions of the fourteenth amendment prohibiting deprivation of one's property without due process of law and other provisions of the National Constitution, rests upon the police powers, which 'are nothing more or less than the powers of government inherent in every sovereignty.' License Cases, 5 How. 583, 12 L. Ed. 256; Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, 393, 14 Sup. Ct. 1047, 28 L. Ed. 1014; Smyth vs. Ames, 169 U. S. 466, 521, 18 Sup. Ct. 418, 42 L. Ed. 819.
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> "While, generally speaking, the police power of a state is said to extend to the protection of 'the public health, the public morals, and the public safety,' the law does not recognize these as the extent of the power, but, as stated, by Mr. Justice Harlan in Chicago, B. & Q. Ry. Co. vs. Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. Ed. 596:
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> " 'We hold that the police power of a state embraces regulations designed to promote the *public convenience and the general prosperity,* as well as the regulations designed to promote the public health, the public morals, or the public safety.'
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> "In Lake Shore, etc. Ry. Co. vs. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 703, the same learned justice, after reviewing the previous decisions of that court, states the conclusions of the court in the following language:
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> " 'Now it is evident that these cases (referring

to the cases cited in the opinion), had no reference to the health, morals, or safety of the people of the state, but only to the public convenience. They recognized the fundamental principle that, outside of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a state, *that relate to its internal order or that involve the public convenience or the general good,* are primarily for the determination of the state, and that its legislative enactments relating to those subjects, and which are not inconsistent with the State Constitution, are to be respected and enforced in the courts of the Union, if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is, to use the words of Chief Justice Shaw, the power 'to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.' Commonwealth vs. Alger, 7 Cush. (Mass.) 53, 85. * * * It may be that such legislation is not within the 'police power' of the state, as those words have been *sometimes,* although *inaccurately,* used; but in our opinion the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public

convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although, when exercised, it may sometimes reach subjects over which national legislation can be constitutionally extended.' "

Again, on page 298 of said opinion Judge Trieber said:

"In Noble State Bank vs. Haskell, 219 U. S. 104, 31 Sup. Ct., 186, 55 L. Ed. —, decided January 3, 1911, involving a banking law providing for a guaranty fund to secure depositors, Mr. Justice Holmes, in speaking of the police power, said:

" 'It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'

"Among other cases in which the same rule is recognized, the following may be appropriately referred to: Camfield vs. United States, 167 U. S. 518, 525, 17 Sup. Ct. 864, 42 L. Ed., 260; Chicago, etc., R. R. Co. vs. Nebraska, 170 U. S. 57, 73, 18 Sup. Ct. 513, 42 L. Ed. 948; Lake Shore, etc. Ry. Co. vs. Smith, 173 U. S. 684, 689, 19 Sup. Ct. 565, 43 L. Ed. 858; Bacon vs. Walker, 204 U. S. 311, 318, 27 Sup. Ct. 289, 51 L. Ed. 499; Halter vs. Nebraska, 205 U. S. 34, 41, 27 Sup. Ct. 419, 51 L. Ed. 696; Western Union Tel. Co. vs. Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088."

Judge Trieber, toward the close of his discussion upon this subject in said case, on pages 301 and 302, clinches the argument in the following terse language:

"Another matter not to be overlooked is, if the State is without the power to regulate purely intrastate transportation because it affects interstate traffic indirectly, where is it vested? Congress is clearly without power to do so, and, of course, it cannot delegate to a commission a power it does not itself possess. In Gibbons vs. Ogden, 9 Wheat. 195, 6 L. Ed. 23, the leading case on that subject, the rule of law, which has never been questioned since, but always followed, was settled that the power committed to Congress by the Constitution does not extend to commerce wholly within the State. In the language of Chief Justice Marshall:

" 'The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusive internal commerce of a state.'

'There can be but one rate, fixed by one authority, whether that authority be the State or Congress. Hanley vs. Kansas City Southern Ry. Co., 187 U. S. 617, 620, 23 Sup. Ct. 214, 47 L. Ed. 333.'

"If complainants' contention is correct, transportation companies, so far as the exclusively internal commerce of a state is concerned, are beyond all control, either from the state or National Government; for, as determined in Gibbons vs. Ogden, supra, the Constitution excluded that class of commerce from the powers vested in Congress by the commerce clause, and, as all state rates indirectly affect interstate rates, they are, if complainant's contention is right, also void. See, also, on this point, the Employers' Liability Cases, 207 U. S. 463, 493, 28 Sup. Ct. 141, 52 L. Ed. 297.

"The result of such a construction would be that the states do not possess one of the most im-

portant powers inherent in every government. The adoption of such a construction by the courts would be justifiable only if any other would do violence to a plain provision of the National Constitution or principles of law so firmly established by previous decisions of the highest court of the land that there is no longer room for construction. In the language of Mr. Justice Peckham in Addyston Pipe & Steel Co. vs. United States, 175 U. S. 211, 231, 20 Sup. Ct. 96, 104, 44 L. Ed. 136:

"'If neither Congress nor the State Legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, State or National, which can legislate upon that subject or prohibit such contracts. This cannot be the case.'"

Our position is further sustained by the court in the case of Southern Pacific Company et al. vs. Campbell et al., in the Circuit Court of the United States for the district of Oregon, and not yet reported in the Federal Reporter. In speaking to the subject, Judge Bean said:

"A large part of the discussion herein is directed to the constitutionality of the Railroad Commission Act, and the contention that the order sought to be enjoined directly and materially effects interstate commerce. Both of these questions were considered and decided by this court in the Campbell case (O. R. N. vs. Campbell, 173 Fed. 957). The opinion of Judge Wolverton in that case contains such an exhaustive, satisfactory and full discussion of the subject as to leave nothing to be added. The averments in the bill that the order of the Commis-

sion interferes with interstate commerce is but the conclusion of the pleader and is not in harmony with the facts alleged. Morrow, circuit judge, says: 'A rate fixed by a State Railroad Commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield.'" (Woodside vs. Tonopah & G. R. Co., 184 Fed. 360.)

We could quote from the decisions of the Interstate Commerce Commission, and cited in division "B" of this brief; also, from the decisions of this Honorable Court further, but those in point are included in the paragraphs and extracts above set out.

It would seem idle to further discuss a proposition so plain. The decisions in support of our position are overwhelming. Before them the opinion of Judge Sanborn, in the circuit court, in the Minnesota Rate Case must fall. Shepherd vs. Northern Pacific Ry Co., 184 Fed. Rep., p. 765.

The Sanborn opinion is without precedent, is a radical departure, a legal impossibility, and is founded upon neither law, logic nor reason. The opinion itself is its own undoing.

As the State rates, both passenger and freight, cannot, as a matter of law, interfere with interstate rates, that ends the contention of the appellee that the Missouri laws in question impinge upon the *commerce clause* of the United States Constitution. The right of the states to regulate intrastate rates must not be confounded with the power which the State may exercise along certain other lines, or along certain lines in the absence of Congress having legislated thereon. The Supreme Court of the United States has never held in a *single instance* that State laws prescribing the *maximum charges for*

passenger and freight traffic wholly within the State were violative of the *commerce clause* of the Federal Constitution. If such rates were held invalid it was upon the ground that the property was taken without due process of law and that the rates as prescribed did not give a reasonable return upon the fair valuation of the property engaged in such traffic, and was, therefore, *confiscatory*. Indeed, under our form of government and under the constitutional powers lodged in each of the two sovereignties, the State and the Federal, it is a *legal impossibility* for a State rate on intrastate commerce to interfere with or affect the interstate rate on interstate commerce. These two classes of commerce stand distinct and separate, and their rates are distinct and separate and controlled by separate sovereignties. The obeying of a law fixing State rates on commerce wholly within the State cannot, as a matter of law, work a discrimination in or affect interstate rates. The *discrimination* spoken of in the Interstate Commerce Act relates solely to interstate commerce. The *discrimination* under State laws and State Constitutions relates solely to intrastate traffic.

The appellee and other railroads cannot meet and agree upon classifications of freight such as Western classifications, etc., and form passenger associations, etc., and by agreement or individual action fix passenger and freight rates on their interstate traffic and by reason of such action, on their part stand immune from the constitutional classification of interstate and intrastate commerce, and stand immune from the police power of the State or its authority to fix reasonable maximum rates on intrastate commerce.

The roads cannot by agreement or by individual action arbitrarily or in any other manner name, fix and file passenger and freight rates on their interstate traffic, and then be heard to say that, if perchance, the State rates fixed thereafter by State legislation, should cause them for their *own convenience or for business reasons or to meet competition or for*

any other reason, short of legal compulsion, to change their said interstate rates, that then, by reason of such fact, such State rates, *even though remunerative,* would be invalid.

That because the roads for their own convenience or for business reasons, etc., *voluntarily rearranged* their interstate rates and made them conform to the State rates fixed by law, such action would constitute the State legislation a direct and substantial burden on interstate commerce and therefore violative of section 8 of article I of the Constitution of the United States. The important fact is overlooked that the change made in interstate rates was not made by reason of *legal compulsion, but by voluntary action.*

That when the rates fixed by a State on intrastate commerce, although giving a fair and reasonable return on the fair valuation of the property engaged in the commerce, causes the roads for business or for any other reason, short of legal compulsion, to change the rates which they had arbitrarily named and fixed on their interstate commerce and had filed, that the statute of the State must by reason thereof be declared violative of the commerce clause of the Constitution.

That the roads have a right to arbitrarily or in any other manner fix interstate rates on their interstate commerce at *any amount* they see fit and proper, by agreement or individual action, and that that right is supreme to and paramount to the police power of the State to name reasonable maximum freight and passenger rates on intrastate traffic. That the authority which was thought to be safely lodged in the State under the Federal Constitution must bow to the mere will, caprice, agreement or individual action of the railroads. That the roads can, by agreeing upon rates or by individually naming rates as to interstate traffic, take away from the State its police power to fix reasonable maximum rates on intrastate commerce. This is absurd, ridiculous and monstrous.

The reduction of State rates cannot as a matter of law, interfere with interstate rates. It is a legal impossibility and an impossibility in fact. They constitute two separate classes, and the raising or lowering of one can in no wise affect the other. As was stated by the late Mr. Justice Brewer, in the case of Ames vs. U. P. Ry. Co., supra, the statutes of the State cannot work a change in interstate rates any more than an act of Congress prescribing interstate rates can legally work a change in local rates. That the railroad companies cannot plead their own convenience or business reasons or the effect of competition between themselves and other companies, *in restraint of the otherwise undeniable power of the State.*

D.

THE ENFORCEMENT OF THE PASSENGER AND FREIGHT RATE ACTS IN QUESTION WOULD NOT, IN FACT, HAVE THE EFFECT OF DIRECTLY AND SUBSTANTIALLY BURDENING INTERSTATE COMMERCE.

Judge McPherson found the fact to be that said passenger law and said freight rate acts would not be a direct and substantial burden upon interstate commerce. In fact, there was no proof or offer of proof by appellee to show otherwise or from which any other deduction could be made.

The freight rate acts were never placed in effect, because the State officers were enjoined from enforcing same on the very day the laws became effective, and as a consequence were never given a trial.

These acts gave lower freight rates on *carload lots* on certain classes of freight and only affected *carload lots*. As *State carload* freight is only 12.39 per cent of the *entire State freight business* of the company (Vol. 2, pp. 1414-15, Record) and as the acts involved only affect a very small per cent of the 12.39 per cent, therefore, as a fact, there could not be any substantial burden on interstate commerce. The entire business affected is but a very small fraction. This being true, a further discussion as to the freight acts substantially burdening Federal commerce would be a waste of time. This court has recognized that the effect of a reduction of rates is to stimulate business. In the case of Chicago & G. T. R. R. Co. vs. Wellman, 143, U. S. 339, l. c. 343, the Court said:

> "Must it be declared as a matter of law that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experi-

ence suggest the probability *that a reduction of rates will increase* the amount of the business, and, therefore, the earnings."

And this language was quoted with approval in the case of St. Louis, San Francisco R. R. Co. vs. Gill, 156 U. S. 649.

As the freight rates were not placed in effect and the benefit to business activities by reason of reduced rates tested, then the question of their violating section 8 of article I of the Constitution of the United States is mere guess work and conjecture on the part of appellee, in case numer 130, even if it were possible in law for the reduction of State rates on State business to change interstate rates.

The two-cent passenger fare law of 1907 was placed in effect, and no restraining order was issued as to that act during the trial. At the time the two-cent rate on intrastate travel went into effect the interstate rate on interstate travel was 2.1 cents per mile. (Vol. V, p. 5096, Record.) This would simply mean a difference of *one dollar in one thousand mile travel.* Leaving out the question the fact that it is a legal impossibility for the lowering of State rates to change by legal compulsion interstate rates, who would say that the difference of one dollar in one thousand miles would or could be a direct and *substantial burden* on interstate traffic? The interstate rates were afterwards and for *convenience and business reasons and to meet competition, voluntarily reduced* by *the road to 1.83 cents per mile.*

The actual effect of the year (1908), when the two-cent passenger law was tested and tried by appellee was as follows, same being a comparison between the years 1907 and 1908:

1. The number of passengers carried in 1908, increased twenty per cent over the number carried in 1907. (4-4383.)

2. The passenger miles increased during the same year something more than thirty-three and a third per cent. (4.4384.)

3. The total revenue from passenger travel in Missouri, State and interstate for the fiscal year 1907, was $3,348,-753.09. (4-4375.)

4. The revenue from State passenger travel alone in Missouri, for the fiscal year 1907, was $1,473,000. (4-4384.)

5. By subtracting the revenue from State passenger travel, $1,473,000, from the total passenger revenue, $3,348,-753.09, we get the revenue from interstate travel in Missouri for the fiscal year 1907, viz.: $1,875,753.09.

6. As the rate for State travel for 1907 was 2.44 cents per mile, the number of passenger miles made during that year in State travel was $1,473,000, divided by .0244, which equals 60,368,852.

7. As the rate for interstate travel for 1907 was 2.10 cents per mile, the number of passenger miles made during that year in interstate travel was $1,857,753.09, divided by 021, which equals 89,321,576.

The number of passengers in State and interstate travel respectively for the year 1907, can be ascertained by dividing the number of passenger miles by the average length of journey.

We get, then, the following table:

	1907.	1908.	Increase for 1908.
Interstate passengers.....	910,793	987,808	77,015
State passengers.....	1,978,009	2,695,868	717,859
Total passenger miles.....	149,690,428	179,139,154	29,448,726
Interstate " "	89,321,576	96,872,744	7,551,168
State " "	60,368,852	82,266,410	21,897,558
Total passenger revenues.....	$3,348,753.09	$3,389,491.19	$40,738.10
Interstate " "	$1,875,753.09	$1,777,788.27	(dec)$96,964.82
State " "	$1,473,000.00	$1,611,702.92	$138,702.92

Here, then, is an increase in the volume of business for the fiscal year 1908, in every respect, state and interstate. There is a greater number of passengers in each class and a greater number of passenger miles.

The total revenue for the year shows an increase, and

there is a substantial increase in the State passenger revenue. It earned more revenue under the reduced rate (two-cent rate), than under the three-cent law, and did so with a cheaper and more inferior service. The interstate shows a loss, the increase in the volume of travel not having been sufficient to compensate for the reduction *voluntarily made by the company for business convenience or to meet competition from* 2.1 *cents per mile to* 1.83 *cents per mile on its interstate traffic.*

A comparison of 1908 under the two-cent passenger fare law with the year 1907, under the three-cent passenger fare law under the above facts, discloses that under the two-cent rate the number of passengers increased 717,859 or 36 per cent, the number of passenger miles increased 21,897,558 or 36 per cent, and appellee's revenue on passenger traffic increased $138,702.92 or 9 2-5 per cent. This, too, in the face of a nation-wide panic, and a year of great depression. The facts belie the charge and certainly make interesting reading, not only to refute the contention as to violating section 8 of article I of the Constitution of the United States, but as well the charge that the rate is *confiscatory.*

Notwithstanding Judge McPherson found against appellee upon the contention (Vol. V., pp. 5288, 5292 Record), notwithstanding the facts above and the matters hereafter presented, and notwithstanding that the mere changing of the maximum passenger and freight rates on intrastate traffic cannot, as a matter of law, change or affect interstate rates or commerce within the meaning of section 8 of article I of the Constitution of the United States, yet, appellee continues to arbitrarily contend that as a matter of fact the passenger law and the freight laws in controversy interfere with interstate rates and are direct and substantial burdens upon interstate commerce. This we have seen cannot be so as a matter of law, and that being true the contention is ended. Aside from the legal question, we have shown it could not be true as a

matter of fact. There was no evidence in the case at bar that such rates mentioned in the acts would as a matter of fact interfere with interstate rates or directly and substantially burden interstate commerce. The freight rates in controversy relate solely to *carload lots* on certain *classes* of freight (but a mere mite of its total freight business in the states). In the cars there cannot be an ounce of interstate freight. The carload of freight is loaded within the State of Missouri, and is delivered in the State, and does not pass beyond the line of the State in transit. This being true, the rate applies strictly to commerce within the State. If it should pass beyond the line of the State in transit, then, notwithstanding the fact, the initial point and the point of delivery are both within the State the shipment would be interstate traffic and the rates in question on such carloads would not apply.

Again, the interstate rates charged as applied to each *class* of freight in *carload lots* and as covered by the acts in question are *less* than the maximum rates prescribed by said State laws. Again, under affirmative proof appellee has charged *less* than the maximum rate prescribed by the statutes of Missouri on its other classes and kind of freight and less than the rates fixed by the Railroad and Warehouse Commissioners.

The case at bar, however, is not burdened with these questions. There is no evidence or proof in this case whatever that either the passenger or the freight rate acts involved would change any interstate rate, no matter how fixed or work a discrimination or burden interstate commerce, neither are there any premises from which any such dedeuction can be drawn.

The Missouri Statutes involved disclose upon the face of each act and specifically provide that such acts apply to passenger traffic and freight traffic wholly within the State of Missouri. There is nothing upon the face of the statutes to show any other purpose or intention, and the effect of a strict

compliance with these freight and passenger laws will not and cannot legally affect interstate rates nor constitute them a direct and substantial burden upon interstate commerce. The contention of appellee is so puerile and so wanting in merit it is but a waste of time to pursue the subject further.

E.

THE LAW PRESUMES THE MISSOURI ACTS ARE VALID AND THAT INCLUDES THE PRESUMPTION THEY DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The law presumes the acts are valid and in that presumption falls the one that the laws do not impinge upon section 8, article I of the Constitution of the United States.

The *burden* of showing that the acts involved *do* violate said *commerce clause* rested upon appellee, and it made no proof or showing whatever in reference thereto. These principles and propositions are supported by the following cases from which we take pertinent extracts.

San Diego Land & Town Co. vs. National City, 174 U. S., 739, 754.

> "But it also should be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, *clearly and beyond all doubt*, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

City of Knoxville vs. Knoxville Water Co., 212 U. S., 1, 8, 16, 17.

"There can be at this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation nor, on the other hand, that the power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. * * * * * * Disregarding for the moment all the errors which were committed in the court below, the decision of this cause may be rested upon a broader ground, which is clearly indicated by the previous judgments of this court. The jurisdiction which is invoked here ought, as has been said, to be exercised *only in the clearest cases.* If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States. In ex parte Young, 209 U. S. 123, the last word of caution by this court was said (p. 166): 'Finally it is objected that the necessary result of upholding this suit in the circuit court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the state, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought

to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts.' The same thought, in effect, was expressed in San Diego Land and Town Company vs. National City, 174 U. S. 739, 754, "judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.' "

Chicago, Milwaukee & St. Paul Railway Company vs. Tompkins, 176 U. S. 167, 173.

"In approaching the consideration of a case of this kind we start with the presumption that the act of the Legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the State must be upheld."

Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79, 91, 97.

"It (this court) has also ruled that the determination of the Legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates. * * * The authority of the Legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions,

but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness."

Reagan vs. Farmers' Loan and Trust Company, 154 U. S. 362, 395.

"If the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just."

Henderson Bridge Company vs. Henderson City, 173 U. S. 592, 614, 615.

"But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power of tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

St. Louis & San Francisco Railway Company vs. Gill, 156 U. S. 649, 666, 667.

"We do not feel warranted by all that appears in this record, in declaring invalid an act of the

Legislature of Arkansas, which on its face appears to be a legitimate exercise of power, and which has not been shown, *by clear and satisfactory evidence,* to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error."

Mr. Justice Brewer in Day vs. Chicago & Northwestern Railroad Company, 35 Fed. 866, 874.

"As said by Chief Justice Waite in the Munn case, supra: 'Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained,' Or, has been elsewhere epigrammatically said: *'A doubt sustains the law.'*"

Louisville & Nashville Railroad Company vs. Kentucky, 183 U. S. 503, 511.

"For the Federal Courts to interfere with the legislative department of the State government, when acting within the scope of its admitted powers, is always the exercise of a delicate power, one that should not be resorted to unless the reason for doing so is clear and unmistakable."

PART II.

THE FREIGHT AND PASSENGER RATES INVOLVED ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARE NOT, THEREFORE, CONFISCATORY.

A.

STATEMENT OF LEGAL PRINCIPLES PRELIMINARY TO THE DISCUSSION OF THE CASE; ALSO AS TO THE NUMBER OF RATE CASES CONSIDERED BY THIS COURT.

In the presentation of the question as to whether or not the freight and passenger rates involved are confiscatory, there are certain fundamental principles of law to which it is well to call attention, preliminary to the discussion and review of the case and its evidence, and which legal principles are as follows:

I.

The Legislature of Missouri was authorized to prescribe reasonable maximum rates on intrastate traffic.

Stone vs. Farmers' Loan & Trust Co., 116 U. S. 307.

Chicago & Grand Trunk R. R. Co. vs. Wellman, 143 U. S. 739.

Lehigh Valley R. R. Co. vs. Pennsylvania, 145 U. S. 192.

II.

The freight and passenger laws involved are presumptively valid.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Tompkins, 176 U. S. 167, 173.

Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79, 91, 97.

Reagin vs. Farmers Loan & Trust Co., 154 U. S. 362, 395.

III.

The burden of proving said laws are confiscatory rests upon the Chicago, Burlington & Quincy Railroad Company.

San Diego Land and Town Co. vs. National City, 174 U. S. 739.

IV.

The Burlington must establish that the rates are confiscatory, clearly, unmistakably and beyond all doubt and by proof that is clear and convincing.

Wilcox vs. Consolidated Gas Co., 212 U. S. 19.

Louisville & Nashville Ry. Co., vs. Ky. 183 U. S. 503, 511.

Northern Pacific Ry. Co. vs. North Dakota, 216 U. S. 579.

V.

All doubts must be resolved in favor of the validity of the freight act and passenger fare law involved.

Henderson Bridge Co. vs. Henderson City, 173 U. S. 614, 615.

VI.

If the Court is in doubt one way or the other as to the laws giving a fair return upon the reasonable valuation of the properties employed, then that doubt sustains the laws.

Day vs. Chicago, Northwestern R. R. Co., 35 Fed. (C. C.) 866, 874.

Northern Pacific Ry. Co. vs. North Dakota, 216 U. S. 579.

VII.

The case is heard and the questions determined *de novo* by this Court and without regard as to how the questions were found and determined by the trial court.

Knoxville vs. Knoxville Water Co., 212 U. S. 1.

VIII.

The rates, both freight and passenger, and business of the road in the State, may be considered in their entirety.

San Diego Land and Town Co. vs. National City, 174 U. S. 739.

IX.

The road may be compelled to carry an article or articles at cost or even at a loss if the return on its entire business in the State affords it a reasonable compensation.

Northern Pacific Ry. Co. vs. North Dakota, 216 U. S. 579.

X.

The road must affirmatively advise the Court what it has done with the receipts and earnings of the company on its entire business in the State, and must not only give the amount showing the disposition of its revenues, but must give the items thereof, its expenses in general statements and in large sums will not be accepted, lest the Court be misled into doing grievous wrong to the public.

Chicago & Grand Trunk R. R. Co. vs. Wellman, 143 U. S. 739.

XI.

The service rendered by the road is an element which must be considered in determining the questions, because the road can only demand what the "services rendered by it are reasonably worth."

Minneapolis & St. Louis R. R. Co. vs. Minn., 186 U. S. 257.

Smyth vs. Ames, 169 U. S. 466.

XII.

Each case must be heard and determined upon its own particular facts and evidence. Reduction in rates does not necessarily mean reduction in revenue. They may have increased business volume and therefore increased earnings.

Smyth vs. Ames, 169 U. S. 466.

Chicago, Grand Trunk R. R. Co. vs. Wellman, 143 U. S. 739.

St. Louis, San Francisco R. R. Co. vs. Gill, 156 U. S. 649.

B.

IN THREE CASES ONLY HAS THIS HONORABLE COURT HELD RATES FIXED BY LEGISLATIVE BODIES FOR PUBLIC SERVICE CORPORATIONS CONFISCATORY. IN EACH OF THE THREE CASES THE FACTS WERE EITHER ADMITTED OR NOT SERIOUSLY CONTROVERTED.

THIS COURT, ON THE OTHER HAND, HAS REFUSED TO HOLD SUCH RATES INVALID ON ACCOUNT OF BEING UNREASONABLE AND CONFISCATORY IN THIRTEEN OR MORE CASES.

The record written by this Honorable Court is the best evidence of its strict adherence to the rule that a statute, constitution or order fixing rates should not be suspended or held invalid save and except on the clearest proof and when the evidence is conclusive. That judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulation as to compel the courts to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use.

In three cases only has this Court held that rates fixed by legislative bodies were invalid. These cases are, Reagan vs. Farmers' Loan and Town Co., 154 U. S. 362; Covington & Louisville Turnpike Road Co. vs. Sandford, 164 U. S. 578; and Smyth vs. Ames, 169 U. S. 466.

(1) The Reagan case (154 U. S. 362) was an appeal from the decree of the Circuit Court of the United States for the Western District of Texas, enjoining a railroad company from continuing in effect rates fixed by the railroad com-

missioners of Texas. This Court affirmed the judgment as to the rates being confiscatory and reversed the case as to the injunction against the commissioners.

The State demurred to the bill of complaint and the case was considered and submitted on demurrer. The Court held that as the evidence had been taken and afterwards the State withdrew its answer and filed a demurrer that it looked like the evidence had sustained the allegations. The bill alleged, among other things, that the rate reduced the annual revenues $200,000.00, and that the rates as fixed were unreasonable and unjust. The full facts were pleaded and stated in detail and the Court said it must assume the allegations to be true as against the demurrer.

(2) The Covington Turnpike case (164 U. S. 578) reached this Court on writ of error to the Court of Appeals of Kentucky to review a judgment affirming the judgment of the Kenton Chancery Court enjoining the Covington Turnpike Road from exacting tolls in excess of those fixed by the legislative act of 1890. This Court reversed the cause and remanded same for further proceedings.

This case came to the Supreme Court of the United States in the same condition, so far as pleadings were concerned, as the Reagan case. Certain parties secured an injunction against the turnpike, preventing the company from collecting rates under a prior statute. This injunction against the road was affirmed on appeal by the Court of Appeals of Kentucky.

The answer of the road plead the amount and sources of its revenue and the amount of its expenses and the cost of maintaining certain parts of the turnpike. It alleged that the proposed rate would prevent the road from receiving sufficient revenue to keep same in proper condition and maintain it and would prevent it from earning any dividends whatever for its stockholders. The plaintiffs demurred to

this answer and the demurrer was sustained. The case therefore was presented on the facts alleged in the answer, same being taken as true against the demurrer.

The Court held that the allegations were sufficiently full as to the necessary facts which must be pleaded and fairly raised the question whether the act impinged upon the constitutional rights of the road. That it made a prima facie case of the invalidity of the statute and that this Court could say so as a matter of law.

(3) The Ames case (169 U. S. 466) was an appeal from the decree of the Circuit Court of the United States for the District of Nebraska, enjoining the railroad companies from making a schedule of rates reducing them to those prescribed by the Nebraska act of 1893, and restraining the board of commissioners from hearing or determining any complaints against the roads, etc., granted by said decree. This Court affirmed the judgment.

The Court held that the kind and amount of business and cost thereof are factors which determine largely questions of rates. That one must consider the value of the property used by the road at the time and must also consider the value of the *service rendered*. The court also said:

> "Each case must depend upon its own facts. Reduction of rates does not necessarily mean reduction of revenue. They may have increased business volume and therefore increased earnings."

In thirteen cases at least has this Court refused to sustain the action of the lower courts holding rates fixed by legislative bodies as unreasonable and confiscatory. These cases are as follows, to wit:

1. San Diego Land and Town Co. vs. National City, 174 U. S. 739.

2. Chicago & Grand Trunk Railroad Co. vs. Wellman, 143 U. S. 739.

3. Stanislaus Co. vs. San Joaquin & K. River Co., 192 U. S. 201.

4. Dow vs. Beidelham, 125 U. S. 680.

5. St. Louis & S. F. R. R. Co. vs. Gill, 156 U. S. 649.

6. San Diego Land and Town Co. vs. Jasper, 189 U. S. 439.

7. Minneapolis & St. L. R. Co. vs. Minnesota, 186 U. S. 257.

8. Atlantic Coast Line R. Co. vs. Florida, 203 U. S. 256.

9. Sea Board Air Line R. Co. vs. Florida, 203 U. S. 270.

10. Alabama & V. R. Co. vs. Mississippi R. Commission, 203 U. S. 496.

11. Knoxville vs. Knoxville Water Co., 212 U. S. 1.

12. Wilsox vs. Consolidated Gas Co., 212 U. S. 19.

13. Northern Pacific Ry. Co. vs. N. Dakota ex rel., 216 U. S. 579.

(1) The San Diego case (174 U. S. 739) was an appeal from the Circuit Court of the United States for the Southern District of California. The circuit court dismissed the bill and this Court affirmed the judgment of the circuit court. This Court, at page 754, said:

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

This Court said that the company was "not entitled to a given per cent." That *"rates in their entirety are to be considered."* That the court could not look at them in any other light.

(2) The Wellman case (143 U. S. 345) came to this

Court upon writ of error to the Supreme Court of Michigan to review the judgment affirming the judgment of the circuit court sustaining the validity of an act of the Legislature regulating passenger fares. This Court affirmed the judgment of the Supreme Court of Michigan. On page 346 the Court said:

> "Of what do these operating expenses consist? Are they made up partially of extravagant salaries, etc.? Surely before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, etc., *they should be fully advised as to what is done with the receipts and earnings of the company;* for if so advised it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interests and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by *exorbitant and unreasonable salaries or in some other improper way,* transfer its earnings into what it is pleased to call *operating expenses.*"

Again, on the same page the Court said:

> "Our suggestion is only to indicate how easily courts may be misled into doing grevious wrong to the public and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements and without the *fullest disclosure of all material facts.*"

(3) The Stanislaus County case (192 U. S. 201) was an appeal from the Circuit Court of the United States for the Northern District of California to review a decree setting aside an ordinance regulating water rates. This Court reversed the decision and ordered the bill dismissed.

(4) The Dow case (125 U. S. 680) came up upon writ of error to the Supreme Court of Arkansas to review a judgment of that court affirming the judgment of the state circuit court for the statutory penalty for the taking of illegal fares by the agent of the company for the carriage of passengers. This Court affirmed the judgment of the Supreme Court of Arkansas.

(5) The Gill case (156 U. S. 649) reached this Court upon writ of error to the Supreme Court of Arkansas to review a judgment of that court affirming the judgment of the county circuit court in favor of plaintiff for the penalty imposed by the Arkansas statute for overcharges by that company for passenger fares. This Court affirmed the judgment. The railroad filed a special plea raising Federal questions. Plaintiff's demurrer thereto was sustained. The road made offers tending to show rates unreasonable. The Court held the evidence offered did not cover the company's business as an entirety in Arkansas.

(6) The San Diego case (189 U. S. 439) was an appeal from the Circuit Court of the United States for the Southern District of California to review the court's action in dismissing the bill to have an ordinance of the board of supervisors fixing irrigation rates declared void for unreasonableness. This Court affirmed the judgment of the circuit court.

(7) The Minneapolis & St. L. R. Co. case (186 U. S. 257) was a writ of error to the Supreme Court of Minnesota to have this Court review the judgment of that court affirming the judgment of the district court of Ramsey county confirming rates made by the board on hard coal and direct-

ing the issuance of a writ of mandamus compelling compliance with said rates. This Court affirmed the judgment of the Supreme Court.

This Court, on page 268, said:

> "What the company is entitled to ask is a fair return from the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the *services* rendered by it are reasonably worth."

(8) The Atlantic Coast Line case (203 U. S. 256) was heard on writ of error to the Supreme Court of Florida to review the judgment of that court awarding a peremptory writ of mandamus to enforce an order of the railroad commission on local rates for carrying phosphate. This Court affirmed the judgment below.

(9) The Sea Board Air Line case (203 U. S. 270) was a writ of error to the Supreme Court of Florida to review a judgment of that court awarding a writ of mandamus enforcing an order of the railroad commissioners fixing local rates. This Court affirmed the judgment below.

(10) The Alabama & Vicksburg Railroad Company case (203 U. S. 496) was a writ of error to the Supreme Court of Mississippi to review a decree affirming a decree of the Chancellor of the Fifth Chancery District dismissing a bill to restrain the enforcement of an order of the railroad commissioners for rates on grain and grain products. This Court affirmed the judgment of the Supreme Court of that state.

(11) The Knoxville Water Company case (212 U. S. 1) was an appeal from the Circuit Court of the United States for the Eastern District of Tennessee to review a decree enjoining the enforcement of a municipal ordinance fixing

maximum water rates. This Court reversed and remanded the case with directions to dismiss the bill.

This Court held that the finding of the court was not conclusive in cases involving the overthrow of a legislative enactment or municipal ordinance. That this Court had absolute freedom in dealing with such subjects and was not bound by any findings below.

(12) The Consolidated Gas Company case (212 U. S. 19) was an appeal from the Circuit Court of the United States for the Southern District of New York to review a decree enjoining the enforcement of the New York statute regulating gas rates. This Court reversed and remanded the case with directions to dismiss the bill.

The Court said:

> "Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the Legislature of the state of New York are in fact confiscatory."

(13) The Northern Pacific Railway Co. case (216 U. S. 579) was a writ of error to the Supreme Court of North Dakota to review a decree enjoining a carrier from further violation of a law fixing rates for the carriage of coal within the state. This Court affirmed the judgment of the Supreme Court of that state.

Mr. Justice Holmes, in speaking for the Court, said, on page 580:

> "But laying technical objections on one side and taking the fact as admitted, the argument for the state showed that there are too many elements of uncertainty in the calculation for us to say, if we could, as to which we intimate no opinion, that the conclusion is proved."

It was further said in the opinion that the road might be compelled to carry an article at cost or at a loss if the return on its entire business afforded reasonable compensation.

These cases evidence the care and caution with which this Honorable Court has approached the consideration of such cases and wherein it has been called upon to declare a rate invalid by reason of impinging upon the Fourteenth Amendment to the Federal Constitution.

I.

FACTORS NECESSARY TO KNOW IN ORDER TO DETERMINE WHETHER OR NOT THE RATES, BOTH FREIGHT AND PASSENGER, ARE CONFISCATORY OR AFFORD A REASONABLE RETURN.

In the first part of our brief we have discussed these acts and rates in connection with the commerce clause of the Constitution of the United States. We now propose, although the duty does not rest upon us, to satisfy this Honorable Court that neither said freight nor passenger rates are confiscatory, but that the freight rates and the passenger rates in Missouri, when considered separately or together, afford the Burlington Railroad a reasonable return upon the fair value of the properties employed. That no matter whether the State passenger traffic or State freight traffic be considered separately or the State business be considered in its entirety, the road in each and every instance receives a return far in excess of the legal rate of interest fixed by the laws of the State.

As each and every case must stand upon its own facts and evidence, there are certain factors which it is absolutely necessary to know in order to determine whether or not the rates in question are confiscatory. The determination of the question is merely the solution of an ordinary problem in arithmetic. The factors necessary to know are as follows:

NECESSARY FACTORS.

1. The reasonable value of the properties employed in the business.

2. The reasonable value of the properties less the franchise.

3. The amount of the value assignable to State freight traffic.

4. The amount of the value assignable to State passenger traffic.

5. Gross amount of revenue received.

6. The gross amount of revenue received from State freight traffic.

7. The gross amount of revenue received from State passenger traffic.

8. Total amount of expense.

9. Amount of expense assignable to State freight traffic.

10. Amount of expense assignable to State passenger traffic.

11. Taxes assignable to freight traffic.

12. Taxes assignable to passenger traffic.

13. Amount of diminution in revenue if freight acts had been in effect.

Each and every one of these factors must be established by *affirmative proof on the part of the road.* It being in possession of the true facts, must prove same by the best evidence and cannot shift the burden nor relieve itself of proving same by evidence both clear and convincing.

In the division of the expenses between State and interstate traffic it must prove conclusively that the division has been made in a *correct and fair way.* That it has not burdened the State traffic with a greater amount or per cent of

the expenses than it should justly bear. It must also affirmatively show that the expense in conducting its business were *necessary and reasonable* and that the management has been economical. That such expenses are chargeable to one year rather than to a series of years. In other words, that the expenses are the ordinary operating expenses and are not valuable, permanent and lasting improvements, the expense of which should cover a series of years. The road failed to present any evidence or make proof on any of these matters—it proceeded as if no duty or burden rested upon it in relation thereto.

No presumption can be indulged in favor of any of these factors, but the same must be established by the best evidence and made clear beyond all doubt. A doubt in the establishment of any one of the *principal factors* would be the same as failure in the entire proof. If a doubt is entertained upon the whole case then that doubt validates the acts.

We will now proceed to gather these factors from the Burlington's own statements and work the problem.

II.

VALUATIONS.

THE TOTAL VALUE OF THE PROPERTIES OF THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY IN MISSOURI, TOGETHER WITH THE SEPARATE AMOUNTS OF THAT PART OF THE VALUATION, ASSIGNABLE TO STATE FREIGHT AND STATE PASSENGER TRAFFIC AND UPON WHICH SEPARATE VALUES IT IS ENTITLED TO A REASONABLE RETURN. THE COMPANY, HOWEVER, IS NOT ENTITLED TO ANY RETURN UPON THAT PART OF THE VALUATION REPRESENTED BY ITS FRANCHISE.

The first factor which must be known is the reasonable value of the properties of the Burlington used in handling its traffic in Missouri, State and interstate. Having ascertained the fair value of those properties, it must next be ascertained what part of that value is to be assigned to the State passenger traffic and what part is to be assigned to the State freight traffic, to the end we may know upon what amount the company is entitled to a return in each of the acts, passenger and freight, involved and to the end we may know whether or not considering the whole rates and its entire State business, the company is receiving a reasonable return.

The court, on page 5311 of the printed record, found the value of the properties of the Burlington in Missouri, to be $53,172,907.83, and also found on the same page, that the value per mile was $46,793.00, and that the number of miles in Missouri was 1,136.34. The court, in fixing this valuation, fixed exactly the valuation placed upon same by the State Board of Equalization of the State of Missouri on the theory that the Board aimed to assess at one-third of the value of

the properties. In other words, the evidence offered was merely the judgment of the State Board of Equalization. That was not the way to prove and establish the fair value of the properties of the company in Missouri. This value was a matter of affirmative proof which the road could not shift and from which it could not relieve itself. The judgment of the Board may have been faulty and it may have reached a valuation for assessment purposes more than one-third. The court cannot accept and receive its judgment for the purposes of this case.

That this was the way in which the proof was made and upon which the court based its finding as to value, we cite the court to pages 5098, 5092, 4773, 5191 to 5224, printed record. We also call the court's attention to the following on page 1039, printed record:

> "It is agreed between the parties that the basis of the assessment is upon the basis of one-third of the value of the property, in the judgment of the Board."

The following quotation is taken from Burlington, exhibit No. 98, at page 5092, printed record:

> "The value fixed by the State Board of Equalization shows the rate to be confiscatory. The assessment for 1908, was $17,724,302.61, and this was as will be conceded by the State upon one-third of the value as determined by that body. This makes a valuation of $53,172,907.83."

Thus, it will be seen that the court has taken as the valuation of the properties to the *very cent three times* the valuation fixed by the State Board of Equalization, and did so on the strength of the evidence furnished by the records of the

State Board of Equalization offered in evidence and upon the theory that the Board had fixed the value at one-third. In other words, the proof of valuation rests solely upon the judgment of the State Board of Equalization in a record written for another purpose, to wit, taxation. Aside from all this, both the complainant and the court adopted the *wrong theory*, as to what constituted proof of the valuation and what were the elements thereof.

The value as found by the court included the franchise value. The assessment of the franchise value made by the State Board (Record V., pp. 5191-5224), of the twenty-one lines of the Burlington in Missouri, evidence being offered by the road, was $3,462,053.53. This being the sum assessed as the value of the franchise for taxation on a supposed basis of one-third value, this sum must be multiplied by three on the above basis making the franchise value of the properties in the State belonging to the Burlington, amount to $10,386,160.59.

The franchise value then is 19.5 per cent of the total valuation of the properties in the State as fixed by the Board of Equalization. When the franchise value is deducted from the value found by the court, it leaves the total valuation of the properties less the franchise, $42,786,747.24. Should this Honorable Court hold the proof as made as to the valuation of the properties was proper and sufficient, then the value upon which the returns should be figured are as follows:

Total valuation, including franchise, of all properties in Missouri of the Burlington, same being three times the amount fixed by the State Board of Equalization (Exhibit 103, p. 502, Record).....	$53,172,907.83
Without franchise.....	42,786,747.24

Value of that part including franchise assignable to State freight is 13.09 per cent of $53,172,907.83, as State freight is 13.09 per cent of the gross earnings of all business, and is (Exhibit 103, supra).....	$6,960,333.63
Value without franchise.....	5,603,068.58
Value of that part including franchise and assignable to State passenger traffic is 15.91 per cent of $53,172,907.83 as State passenger traffic is 15.91 per cent of the gross earnings of all business (Exhibit 104, Record 5105), and is.....	$8,459,809.64
Value without franchise.....	6,811,146.76

This gives us the following table as to the valuation of properties for the purpose of returns:

TABLE OF VALUATIONS.

Total valuation of all properties including franchise.....	$53,172,907.83
Total valuation of all properties without franchise.	42,786,747.24
Value assignable to State freight, including franchise.	6,960,333.63
Value assignable to State freight without franchise.	5,603,068.58
Value assignable to State passenger, including franchise.	8,459,809.64
Value assignable to State passenger without franchise.	6,811,146.76
Value assignable to both State freight and passenger traffic, including franchise.	15,420,143.27

Value assignable to both State freight and passenger traffic without franchise. $12,414,215.34

These values as applied to the whole properties and as applied to the State freight traffic and the State passenger traffic, both with and without the franchise value, give us every factor in reference to valuations necessary to solve the problem.

The values we take and use in our examples, as assignable to the property engaged in the State traffic are the values assigned by the railroads and accepted by the court. The court committed error in so doing and we do not accept these values as correct. We take them simply to show even on the road's and court's own basis the laws are remunerative. The court ascertained the value of the properties assignable to the State traffic on the "REVENUE BASIS." This Honorable Court condemned that method in the case of Chicago, Milwaukee & St. Paul Railroad Co. v. Tompkins, 176 U. S. 176. This error of the court alone should reverse the case at bar. It must be remembered that the revenue per ton mile from *State freight* is more than *twice* as large as that per ton mile from *interstate freight*. The "REVENUE BASIS" adopted by the court regards the value of property while being used for *State traffic as double its value when used for interstate traffic*, while the truth is as demonstrated by the evidence that the State freight business earns approximately the *same gross revenue from $5,000 worth of property as the interstate business derives from the use of $10,000 worth of property*.

If a mile of roadbed and track is worth $15,000 while a ton of *interstate freight* is moving over it, it is inconceivable how that within the next hour its value must be doubled to $30,000 as a ton of *State freight* passes over it.

III.

REVENUES.

REVENUE OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY IN MISSOURI FOR THE YEAR ENDING JUNE 30, 1908.

The second factor to be ascertained is the total amount of revenue the Chicago, Burlington & Quincy Railroad Company has received from its business in Missouri, both State and interstate. This is the second step to be taken in solving the mathematical problem.

The total freight earnings in Missouri for the year ending June 30, 1908 (Exhibit 103, page 5101, Printed Record), were $8,196,608.92. Full explanation and evidence as to exhibit is found on pages 4763, 4773 of record. Of this amount the earnings on the State freight business were $1,612,272.97, and the earnings on interstate freight business were $6,584,335.95. The division was made on the basis of per cent given by the road in exhibit 100, page 5097, to wit, 80.33 per cent for interstate, and 19.67 per cent for State, page 4765, printed record.

The total passenger earnings in Missouri for the year ending June 30, 1908 (Exhibit 104, page 5104, printed record), were $4,120,513.08, of which amount the earnings on State passenger business were $1,959,303.83, and the earnings on interstate passenger business were $2,161,209.25. Explanation of and evidence as to exhibit 104, is found on pages 4767, 4773, record.

Thus, the total passenger and freight revenue received by the Burlington from its entire business, State and inter-

state in Missouri for the year ending June 30, 1908, was $8,196,608.92 on freight and $4,120,513.08 on passenger, making a grand total of $12,317,122.00. From the above figures we have then the following table:

REVENUE TABLE.

STATE.

Revenue from State freight.....	$1,612,272.97
Revenue from State passenger...	1,959,303.83
Total revenue State business....	$3,571,576.80

INTERSTATE.

Revenue from interstate freight..	$6,584,335.95
Revenue from interstate passenger	2,161,209.25
Total revenue interstate business	$8,745,545.20

GRAND TOTAL.

Total revenue State business, freight and passenger.....	$3,571,576.80
Total revenue interstate business, freight and passenger.....	8,745,545.20
Grand total.	$12,317,122.00

The ton miles of State and interstate freight is ascertained by dividing the State and interstate freight earnings shown in exhibit 100, page 5096-8, printed record, by the revenue per ton per mile on the two classes of freight as shown in exhibit 36, the ton miles so arrived at being (Exhibit 103, page 5103, record).

State—92,797,654 or 10.62 per cent whole number ton miles.

Interstate—780,967,921 or 89.38 per cent whole number ton miles.

The passenger miles according to the road's exhibit 98, page 5093 record, is:

State—82,266,410 or 45.92 per cent of whole number.

Interstate—96,872,744 or 54.08 per cent of whole number.

The State freight earnings of $1,612,272.97, is 13.09 per cent of the gross earnings of all business in the State.

The State passenger earnings of $1,959,303.83, is 15.91 per cent of the gross earnings of all business in the State.

With these ascertained and known revenues from both the freight and passenger business in Missouri, and with the amounts definitely known as to each class of business, whether State or interstate, and with the number of ton miles of freight, both State and interstate, known and the per cent each class is of the whole, and with the number of passenger miles known, both State and interstate, and the per cent of each of the whole, we have all the factors as to revenue necessary to a proper consideration of the subject and solution of the problems being submitted. We have called attention to these specific revenues and the classes, state and interstate, and the ton miles and passenger miles and percentages because they will be referred to later, and will be useful in reaching the proper final result.

IV.

EXPENSES.

TOTAL EXPENSES OF THE C., B. & Q. RAILROAD COMPANY FOR THE YEAR ENDING JUNE 30, 1908, TOGETHER WITH THE ASSIGNMENT OF THAT PART OF THE EXPENSE CHARGEABLE TO STATE AND INTERSTATE BUSINESS SEPARATELY, TOGETHER WITH AN ASSIGNMENT OF THE EXPENSE CHARGEABLE TO STATE FREIGHT AND STATE PASSENGER BUSINESS SEPARATELY. ALSO AMOUNT OF DIMINUTION OF REVENUE HAD FREIGHT ACTS BEEN IN FORCE.

The third factor necessary is the expense. The total amount of the expenses of the Burlington in the transaction of its entire business in Missouri, both State and interstate, for the year ending June 30, 1908, and as given by the road itself is, not including taxes (Exhibit 98 and 103), $10,320,-922.41.

ASSIGNMENT OF FREIGHT EXPENSE.

Total freight expense undivided between State and interstate less rentals, etc. (Exhibit 103, page 5101, printed record), not including taxes, is	$6,665,746.38
This total freight expense divided between State and interstate on the basis of ton miles (Exhibit 103), is as follows:	

Expense chargeable to State freight, not including taxes, is (Exhibit 103, printed record).....	$707,902.27
Expense chargeable to interstate freight is (Exhibit 103, printed record).	5,957,844.11

ASSIGNMENT OF PASSENGER EXPENSE.

Total passenger expense undivided between State and interstate (Exhibit 104, printed record, 5103) is	$3,398,575.14
Total passenger expense divided between State and interstate on the basis of passenger miles (Exhibit 104), is as follows:	
Expense chargeable to State passenger traffic is (Exhibit 104, printed record)	1,560,625.70
That part of expense chargeable to interstate passenger traffic is (Exhibit 104, printed record).....	1,837,949.44

TAXES.

The amount of taxes assigned to State freight expense (Exhibit 103, p. 5102, record), is.....	$12,553.18
The amount of taxes assigned to State passenger expense (Exhibit 104, p. 5104, record), is.....	54,649.29

DIMINUTION IN REVENUE HAD FREIGHT LAWS INVOLVED BEEN ENFORCED.

If the freight laws in question had been in force, the diminution in revenue on State freight would	

have been (Exhibit 103, p. 5102 and p. 4767 record explaining the exhibit) $112,533.71

We now have all the factors necessary to state the problem and work the example. There is no diminution to consider in the passenger fare law, because it was placed in force and the passenger revenue increased $138,702.92 or 9.40 per cent, and as shown by the evidence in Vol. IV, pp. 4383, 4384, 4375.

V.

FREIGHT.

STATEMENT AND SOLUTION OF STATE FREIGHT EXAMPLE.

From the given factors the problem as to the net per cent return on State freight traffic is stated as follows:

If that part of the total valuation of the properties of the Chicago, Burlington & Quincy Railroad Company in Missouri, assignable to the State freight traffic, including franchise, is $6,960,333.63, and without the franchise is $5,603,-068.58; and, if the revenue of the road on its State freight traffic for the year ending June 30th, 1908, is $1,612,272.97; and, if its expense in handling said State freight for that year is $707,902.27; and, if the portion of taxes assignable to the State freight is $12,553.18; and, if the Burlington had obeyed the Missouri freight laws involved, its revenue on State freight for said year would have been reduced $112,-533.17; what per cent. would the road have received on its said valuation, both with and without the franchise, had the freight laws involved been in force?

NO. 1.

SOLUTION OF STATE FREIGHT EXAMPLE.

Revenue from State freight.....		$1,612,272.97
Expense of handling State freight	$707,902.27	
Taxes assignable to State freight	12,553.18	
Total expense	$720,455.45	720,455.45
Net profit on State freight.....		$891,817.52

Diminution in State freight revenue if the freight laws involved had been in force	$112,533.71
Net revenue had freight laws involved been in force	$779,283.81
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $6,960,333.63, and the net returns, including the diminution had the freight laws involved been in force, being $779,283.81, then, if said freight laws had been in force, the Burlington would have received a net return on said valuation (divide $779,283.81 by $6,960,333.63) of	11.19%
Upon the valuation, less the franchise value, the Burlington, if said freight laws had been in force, would have received a net return (divide $779,283.81 by $5,603,068.58) of	13.90%

Thus, on the basis that the State freight and the interstate freight cost the same per ton mile, we find that the Burlington would have received a net return of 11.19 per cent. on that part of the valuation, including the value of the franchise assigned to State freight, and a net return of 13.90 per cent. with the franchise value deducted.

They say, however, there is some evidence to the effect that it costs 30 per cent. more *per ton mile* to handle State freight than it does to handle interstate freight. Very well, we will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $891,876.87 (Vol. V, Exhibit 103, Record 5101-2).

NO. 2.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 30 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight		$1,612,272.97
Expense of handling State freight (Exhibit 103, pp. 5101-2 Record)	$891,876.87	
Taxes assignable to State freight	12,553.18	
Total expense	$904,430.05	904,430.05
Net profit on State freight		$707,842.92
Diminution in State freight revenue if the freight laws involved had been in force		112,533.71
Net revenue had freight laws involved been in force		$595,309.21
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $6,960,333.63, and the net returns, including the diminution had the freight laws involved been in force, being $595,309.21, then, if said freight laws had been in force, the Burlington would have received a net return on said valuation (divide $595,309.21 by $6,960,333.63) of		8.55%
The per cent. of return, less the franchise value assignable to State freight, is (divide $595,309.21 by $5,603,068.58)		10.65%

Thus we see even though we charge State freight with 30 per cent more expense per ton mile than we charge interstate freight, the Burlington gets a return of 8.55 per cent on that part of the valuation assigned to State freight, including franchise value, and a return of 10.65 per cent with the franchise value deducted. So with these freight laws involved in force it would receive 8.55 per cent return in the one instance and 10.65 per cent return in the other.

They say, however, there is some evidence to the effect that it costs 50 per cent more *per ton mile* to handle State freight than it does to handle interstate freight. (Judge McPherson found that on the "revenue basis," a different basis to the *ton mile*, it cost 50 per cent more to handle State freight than it did interstate freight, Vol. V, p. 8, page 5310, Record. As State freight rate is two times as much as the interstate rate, Exhibit 36, Vol. II, page 2407, Record, this finding that it costs 50 per cent more is a finding that it costs *three times* as much to handle *State freight as interstate freight* on the revenue basis because the rate in one is *twice* as great as the other, and which is ridiculous and absurd.) We will solve the example, however, on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $1,007,860.85 (Vol. V, Exhibit 103, Record 5101-2).

NO. 3.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 50 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....	$1,612,272.97
Expense of handling State freight (Exhibit 103, pp. 5101-2, Record	$1,007,860.85

Taxes assignable to State freight	12,553.18	
Total expenses	$1,020,414.03	$1,020,414.03
Net profit on State freight		$591,858.94
Diminution in State freight revenue if the freight laws involved had been in force		112,533.71
Net revenue had freight laws involved been in force		$479,325.23
The valuation for that part of the whole properties assigned to State freight including franchise value being $6,960,333.63, and the net return including the diminution had the freight laws involved been in force, being $479,325.23, then if said freight laws had been in force the Burlington would have received a net return on said valuation (divide $479,325.23 by $6,960,333.63) of		6.88%
The per cent of return, less the franchise value assignable to State freight is (divide $479,325.23 by $5,603,068.58 being total value less the franchise value assigned to State freight)		8.54%

So, on the basis of State freight costing 50 per cent more per ton per mile to handle than interstate freight gives a return of 6.88 per cent with the franchise value included and 8.54 per cent with franchise value deducted.

VI.

PASSENGER.

STATEMENT AND SOLUTION OF STATE PASSENGER EXAMPLE.

From the given factors the problem as to the net per cent return on State passenger traffic is stated as follows:

If that part of the total valuation of the properties of the Chicago, Burlington & Quincy Railroad Company in Missouri, assignable to the State passenger traffic, including franchise, is $8,459,809. 64, and without the franchise value is $6,811,146.76; and, if the revenue of the road on its State passenger traffic for the year ending June 30, 1908, is $1,959,303.83; and, if its expense in handling said State passenger traffic for that year is $1,560,625.70; and if the portion of taxes assignable to the State passenger traffic is $54,649.29, what per cent did the road receive on its said valuation, both with and without the franchise value?

(The passenger rates were placed in force and there was no diminuttion of revenue, but on the other hand the State passenger traffic increased under the reduced rate $138,702.92, or 9.40 per cent over the preceding year. The number of State passengers increased 717,859 in 1908 (Vol. IV, p. 4383).

NO. 1.

SOLUTION OF STATE PASSENGER EXAMPLE.

Revenue from State passenger traffic....	$1,959,303.83
Expense of passenger traffic	$1,560,625.70

Taxes assignable to passenger traffic.....	54,649.29	
Total expenses..	$1,615,274.99	1,615,274.99
Net profit on State passenger traffic....		$344,028.84
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $8,459,809.64, and the net returns being $344,028.84, then the Burlington received a net return on said valuation (divide $344,028.84 by $8,459,809.64) of.....		4.07%
Upon the valuation less the franchise value, the Burlington received a net return (divide $344,028.84 by $6,811,146.76) of		5.05%

On the basis that the State passenger traffic and interstate passenger traffic cost the same per passenger mile, the Burlington received a net return of 4.07 per cent on that part of the valuation including the franchise value assigned to State passenger traffic, and a net return of 5.05 per cent with the franchise value deducted.

There is evidence to the effect that it costs 10 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $1,463,702.60. (Vol. V, Exhibit 104, Record, p. 5105.)

NO. 2.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 10 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic...		$1,959,303.83
Expense of passenger traffic (Exhibit 104, p. 5105 Record)....	$1,463,702.60	
Taxes assignable to passenger traffic	54,649.29	
Total expense..	$1,518,351.89	$1,518,351.89
Net profit on State passenger traffic....		$440,951.94
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $8,459,809.64, and the net returns being $440,951.94, then the Burlington received a net return on said valuation (divide $440,951.94 by $8,459,809.64) of.....		5.22%
Upon the valuation, less the franchise value, the Burlington received a net return (divide $440,951.94 by $6,811,146.76) of		6.48%

On the basis that the State passenger traffic costs 10 per cent less per passenger mile than the interstate traffic, the Burlington received a net return of 5.22 per cent on that part of the valuation, including franchise value, assigned to State passenger traffic, and received a net return of 6.48 per cent with the franchise value deducted.

There is evidence to the effect that it costs 20 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $1,374,723.64. (Vol. V, Exhibit 104, Record, p. 5104.)

NO. 3.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 20 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic....		$1,959,303.83
Expense of passenger traffic (Exhibit 104, p. 5104, Record)....	$1,374,723.64	
Taxes assignable to passenger traffic	54,649.29	
Total expense..	$1,429,372.93	$1,429,372.93
Net profit on State passenger traffic....		$529,931.90
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $8,459,809.64, and the net returns being $529,931.90, then the Burlington received a net return on said valuation (divide $529,931.90 by $8,459,809.64) of.....		6.26%
Upon the valuation, less the franchise value, the Burlington received a net return (divide $529,931.90 by $6,811,146.76) of		7.78%

On the basis that the State passenger traffic cost 20 per

cent less per passenger mile than the interstate traffic, the Burlington received a net return of 6.26 per cent on that part of the valuation, including franchise value assigned to State passenger traffic, and received a net return of 7.78 per cent with the franchise value deducted.

RECAPITULATION.

The actual working of the problem, both freight and passenger, discloses the fact that the Burlington's return upon the valuation of the property assigned to State freight on the several cost bases ranges from 11.19 per cent to 6.88 per cent with the franchise value included, and from 13.90 per cent to 8.54 per cent with the franchise value deducted. That the return upon the valuation of the property assigned to State passenger traffic on the several cost bases ranges from 6.26 per cent to 4.07 per cent with the franchise value included, and from 7.78 per cent to 5.05 per cent with the franchise value deducted.

Without further comment at this place we will give a recapitulation of the return in a table below and which speaks for itself in language more forceful than the sophistries of counsel, more forceful than the findings of the court based upon conjecture, and more forceful than the biased opinions of interested witnesses given without any actual knowledge or foundation upon which to base them. These results give us the real truth based upon and worked from the Burlington's figures in the case.

RECAPITULATION TABLE—FREIGHT RETURNS.

1. Return on valuation, including franchise on basis cost to handle State and interstate freight is same 11.19%
   With franchise value deducted..... 13.90%

2. Return on valuation, including franchise on basis costs 30 per cent more per ton mile to handle State than interstate freight..... 8.55%
With franchise value deducted..... 10.65%
3. Return on valuation, including franchise on basis costs 50 per cent more per ton mile to handle State than interstate freight..... 6.88%
With franchise value deducted..... 8.54%

RECAPITULATION TABLE—PASSENGER RETURNS.

1. Return on valuation, including franchise on basis cost of State and interstate passenger traffic, is the same..... 4.07%
With franchise value deducted..... 5.05%
2. Return on valuation, including franchise on basis costs 10 per cent less per passenger mile to handle State traffic..... 5.22%
With franchise value deducted..... 6.48%
3. Return on valuation, including franchise on basis costs 20 per cent less per passenger mile to handle State traffic..... 6.26%
With franchise value deducted..... 7.78%

From the recapitulation tables we find that the returns to the road upon each and every basis of dividing expenses between State and interstate traffic, upon both freight and passenger laws involved, give adequate and reasonable returns, and even more.

Under the law (174 U. S. 739, supra) the rates, both freight and passenger, in the State and the business of the Burlington on those rates must be considered in their entirety.

The revenue upon State freight, as we have seen, is $1,612,272.97. The revenue upon State passenger traffic is $1,959,303.83, making the total revenue of both freight and

passenger in the State $3,571,576.80. The total valuation of that part of the property assigned to State freight and State passenger traffic, including franchise, is $15,420,143.27, and without the franchise is $12,414,215.34. We shall, therefore, figure the returns upon both the freight and passenger business in the State considered together and upon the three bases upon which the State freight and State passenger traffic was figured.

When it is remembered that the trial court adopted the "REVENUE BASIS" to ascertain the value assignable to State traffic, and that this court in the case of Chicago, Milwaukee & St. Paul Railroad Co. v. Tompkins, 176 U. S. 176, condemned that method or basis; and, when it is remembered that the value assignable to the property engaged in State traffic, if the actual value is not proven, should be ascertained by finding the proportion that the number of ton miles of State freight bears to the number of ton miles of interstate freight, and the number of passenger miles in the State traffic bears to the number of passenger miles in interstate traffic (Record, Vol. 5, p. 4988), then the court can see and understand that *twice* the real value has been by the court (and used in our figures and examples), assigned to that part of the property engaged and used in State traffic. It necessarily follows that the actual percentages of returns on the value as figured out in all our examples is *double* the percentages of return in each instance which we have shown, on the real value of the properties employed in the State traffic.

VII.

STATE FREIGHT AND PASSENGER TRAFFIC CONSIDERED TOGETHER.

NO. 1.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED TOGETHER AND ON EVEN BASIS AS TO EXPENSE BETWEEN STATE AND INTERSTATE BUSINESS.

Revenue from State freight and State passenger traffic		$3,571,576.80
Expense of State freight, including taxes	$720,455.45	
Expense of State passenger traffic, including taxes	1,615,274.99	
Total expenses	$2,335,730.44	2,335,730.44
Net profit on State freight and passenger traffic		$1,235,846.36
Diminution in State freight revenue if the freight laws involved had been in force		112,533.71
Net revenue had freight laws involved been in force		$1,123,312.65

The valuation of the property used for State freight and passenger traffic, including franchise, is $15,520,143.27.

The net returns being $1,123,312.65 by making the division gives a net return of	7.28%
Upon the valuation, less the franchise, the Burlington received a net return (divide $1,123,312.65 by $12,414,215.34) of	9.05%

Thus on the entire business both State freight and State passenger considered together the return is 7.28 per cent with the franchise value included, and 9.05 per cent with the franchise value deducted.

We will now figure the two together, as example No. 2 was figured as to each separately; that is to say, on the basis that the expense of handling State freight was 30 per cent more than interstate freight and the cost per passenger mile on State traffic was 10 per cent less than interstate passenger traffic.

NO. 2.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 30 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS TEN PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$3,571,576.80
Expense of State freight, including taxes	$904,430.05	

Expense of State passenger traffic, including taxes...	1,518,351.89	
Total expense	$2,422,781.94	2,422,781.94
Net profit on State freight and passenger traffic		$1,148,794.86
Diminution in State freight revenue if the freight laws involved had been in force		112,533.71
Net revenue had freight laws involved been in force		$1,036,261.15
The value of the property used for State freight and passenger traffic, including franchise, is $15,420,143.27. The net returns being $1,036,261.15 by making the division gives a net return of....		6.72%
Upon the valuation, less the franchise, the Burlington received a net return (divide $1,036,261.15 by $12,414,215.34) of		8.37%

On the entire State business on this basis the return is 6.72 per cent with the franchise value included, and 8.37 per cent with the franchise value deducted.

We will now figure the two together, as example No. 3 was figured as to each; that is to say, on the basis that the expense of handling State freight was 50 per cent more than interstate freight, and the cost per passenger mile on State traffic was 20 per cent less than interstate passenger traffic.

NO. 3.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 50 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 20 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$3,571,576.80
Expense of State freight, including taxes	$1,020,414.03	
Expense of State passenger traffic, including taxes	1,429,372.93	
Total expense	$2,449,786.96	2,449,786.96
Net profit on State freight and passenger traffic		$1,121,789.84
Diminution in State freight revenue if the freight laws involved had been in force		112,533.71
Net revenue had freight laws involved been in force		$1,009,256.13
The value of the property used for State freight and passenger traffic, including franchises being $15,520,143.37, and the net returns being $1,009,256.13, by making the division, gives net return of		6.54%
Upon the valuation less the franchise, the Burlington received a net return (divide $1,009,256.13, by $12,414,215.34), of		8.13%

In this example with the franchise included, the return is 6.54 per cent, and with the franchise deducted the return is 8.13 per cent.

So viewing the rate question separately as to freight or separately as to passenger rates, or considering the State business in its entirety in each and every instance, exceptionally reasonable returns have been given to the road. In all these examples we figured the franchise in so as to demonstrate that even when the franchise value was considered the returns were ample. As a matter of law, however, the Burlington is not entitled to any returns upon the franchise value. We will now give the final result in the following table, leaving out the returns with the franchise value included:

FINAL RECAPITULATION OF RETURNS—TABLE OF RETURNS ON EACH SEPARATE CLASS, FREIGHT AND PASSENGER, AND WHEN CONSIDERED TOGETHER, FRANCHISE VALUE DEDUCTED.

Return State freight even basis as to costs.....	13.90%
Return State passenger even basis as to costs...	5.05%
Return State freight and passenger traffic together	9.05%
Return State freight, 30 per cent extra cost basis	10.65%
Return State passenger, 10 per cent less than interstate cost basis.....	6.48%
Return State freight and passenger traffic together	8.37%
Return State freight, 50 per cent extra cost basis	8.54%
Return State passenger, 20 per cent less than interstate cost basis.....	7.78%
Return State freight and passenger traffic together	8.13%

VIII.

BURLINGTON'S EXPENSE ACCOUNT NOT CORRECT.

A.

The above table of returns tells the tale and conclusively disposes of the contention that the rates are confiscating. While that is true, yet the returns should even be greater than set forth in the table. The per cent return in each instance should be increased by reason of the fact that the road's expense account, from which we have taken the figures, *has unquestionably been padded ten per cent at the lowest estimate,* and as we will demonstrate to one's reasonable satisfaction. *If that be true, then the return to the road on its State freight even basis is 15.17 per cent; the return on the 30 per cent extra cost basis is 12.21 per cent; and the return on the 50 per cent extra cost basis is 10.35 per cent. The return to the road on its State passenger traffic even basis is 7.34 per cent; the return upon the basis that State expense is 10 per cent less than interstate is 8.62 per cent; and the return upon the basis that State expenses is 20 per cent less is 9.80 per cent.*

The Court must bear in mind that we have allowed all the enormous, colossal and unprecedented expenses of the road in determining the net per cent return on both State freight and State passenger traffic. We have taken what it said as being true merely for the purpose of the examples and to demonstrate that even upon its own figures it was receiving a high rate of interest upon the value of the properties employed.

The Burlington's expense account was the greatest in the history of the road, and that, too, in a year when all the

roads were, by reason of the panic and business depression, retrenching and reforming their expenses. Its expense in Missouri, where it had level country, was more than *twelve per cent greater than on its system*, and greater than any other system in the United States. Its expenses in Missouri for the year 1908 were *82 2-3 per cent*, while the expense on the system was only *71.08 per cent* for the same year. Its earnings for system for year ending June 30, 1908, were $77,748,-161.52, and its operating expenses were $55.268,407.48, thus making its operating ratio for the system 71.08 per cent. (Page 689, Bulletin No. 5 of Revenues and Expenses of Steam Roads in the United States, issued by Interstate Commerce Commission.) The expense in Missouri had always been *less* than that on its system. In 1904 the expense in Missouri was only *60 per cent*, and in 1905 it was only *66 per cent*, but with Missouri contributing an enormous annual net profit, and with this lawsuit on hands, its operating expenses suddenly jumped to *82 2-3 per cent*, and not a word of explanation or reason for this enormous increase.

During this year of panic and depression its expense of "maintenance of way and structure" alone was *81 per cent* more than it was just two years before. In other words, to consume the revenue in Missouri this convenient item was increased practically two millions of dollars. This expense in 1905 was $1,750,867.36, and in 1908 it was $3,163,895.51, or an actual increase of 81 per cent. (Vol. V, pp. 4750-1.)

Mr. Sturgis, auditor of the Burlington system, testified that the net earnings of the Burlington upon its business in Missouri in 1904 and also in 1905 were *$5,013.00 per mile*, while the net earnings for the same years upon its system were *only $2,347.00 per mile*. (Record, Vol. I, pp. 266-7-8.) Thus the net earnings in Missouri were *$2,666.00 per mile* more than the net earnings per mile upon its system. He

also testified that the gross earnings per mile in Missouri in 1908 were *$11,200.00 per mile*, while the gross earnings upon the system in 1908 were only *$8,700.00 per mile*. (Record, Vol. V, p. 4758.)

During the year 1908, the Burlington, out of the net earnings from its system, made over $20,000,000.00. (Rec., Vol. V, p. 4757.) It paid a dividend of 8 per cent upon its entire capital stock of $110,000,000.00; paid interest on its mortgage indebtedness of $170,000,000.00 (Rec., Vol. I, p. 297); spent $3,225,933.57 for betterments; placed $676,000.00 in a sinking fund and had a large surplus left in its treasury.

Let counsel for the Burlington answer this Honorable Court how it is possible for the complainant to earn $20,000,000.00 net from its system annually, if the Missouri freight and passenger rates are confiscatory, when it admits the rates in Missouri yield $2,666.00 net more per mile than its system, and when Missouri yields $11,200.00 gross revenue per mile and its system only $8,700.00?

Mr. Commissioner Lane, *in reinvestigation of Advances in Rates*, 20 I. C. C., at page 326, said:

> "From a glance at the income statement of the Burlington, it will be seen that its net profits in 1910, after deducting all operating expenses, taxes and fixed charges, amounted to nearly $14,000,000 (which allowed an 8 per cent dividend upon its stock, and a balance or surplus of $5,108,000), or the equivalent of 12 per cent on the common stock. There has not been a year in the past ten when it did not have profits sufficient to pay more than 7½ per cent upon its capital stock of $110,000,000. And since 1903 these have been the percentages earned on capital stock outstanding for the years named: 1903, 13.40 per cent; 1904, 12.32 per cent;

1905, 13.31 per cent; 1906, 12.40 per cent; 1907, 12.49 per cent; 1908, 10.83 per cent; 1909, 11.77 per cent; 1910, 12.61 per cent. The average for the past 10 years is 11.68 per cent."

Mr. Lane's statement deals with the Burlington's entire system. But it is hard to believe that if the entire business is so prosperous and as described by Mr. Lane that the condition of the components would be different from the general results to which he points. Especially is this so when Missouri traffic yields $2,666.00 net per mile more than the yield upon the system. The rates are not confiscatory.

It is an impossibility. It might as well assert that two plus two are five. The rates in Missouri are more remunerative than any other state perhaps in its entire system. No amount of sophistry, mystery, befuddling figures nor mass of incompetent evidence can obscure these plain truths.

Missouri is a great and prosperous State, and the Burlington system traverses its most prosperous and populous sections. It threads the broad and fertile prairies of North Missouri and eats its way into the very maw of the land of the Platte. It runs through the valleys of many rivers and no road in all the land feeds upon a richer country or draws from a more fruitful commerce.

A land where billowy and golden grain reaches from horizon to horizon, where green fields of waving corn stand rank upon rank like plumed hussars, where the hum of industry is heard and where the low of cattle fills all the land. No wonder Missouri contributes $2,500.00 per mile more than is contributed per mile upon the system. No wonder Missouri has yielded it $2,666.00 more net per mile than its system.

B.

BURLINGTON'S REPORTS TO THE INTERSTATE COMMERCE COMMISSION CONDEMN ITS EVIDENCE AND POSITION IN THIS CASE AND MAKE THE ACCURACY OF ITS EXPENSE ACCOUNTS FOR MISSOURI IMPOSSIBLE.

Beginning with July, 1907, under congressional act the steam roads of the United States have filed with the Interstate Commerce Commission monthly reports of the revenues and expenses of each road, and for that purpose they are divided into classes A, B and C.

The Burlington railroad belongs to class A, and filed its report each month since said date, setting out in full its revenues and its expenses, and the same is found in detail in the official bulletin issued by the Interstate Commerce Commission and of which this Court can and should take notice.

Bulletin No. 5 of the "Revenues and Expenses of Steam Roads in the United States," compiled from monthly reports covering the years ending June 30, 1908, and 1909, prepared by the Bureau of Statistics and Accounts, on pages 68 and 69 thereof, has the full report of the Burlington for each and every month since and including the month of July, 1907, to and including the month of June, 1909. On page 21 of said bulletin the Chicago, Burlington & Quincy Railroad Company, on June 30, 1908, had in its system 11,579.37 miles of railroad. On pages 68 and 69 of said bulletin it reports that its total expenses of operation for the system for the year ending June 30, 1908, was $55,268,407.48; and, on the same pages, reports that its total expenses for *"maintenance of way and structure"* for the year ending June 30, 1908, for its *system* was $13,909,353.29.

Now Judge McPherson found that the number of railway miles in Missouri of the Burlington was $1,136.34 (Record, 5311), and the Burlington's exhibit 98, at page 5191 of the printed record, discoses that the total operating expenses for Missouri was $10,301,534.53; and that its expense account for *"maintenance of way and structure"* for *Missouri* for the year ending June 30th, 1908, was $3,163,895.51, being the sum total of the expense for "maintenance of way and structure" as to freight, miscellaneous and passenger traffic.

From these facts and figures we have the following results for the year ending June 30, 1908.

RESULTS.

Burlington's Missouri mileage is 10.67 per cent of its entire system.

Burlington's Missouri expense is 18.60 per cent of its entire system.

Burlington's expense per mile for its system is $4,773.00.

Burlington's expense per mile for Missouri is, $9,065.00.

Burlington's expense per mile for maintenance of way and structures for its system is, $1,201.00.

Burlington's expense per mile for maintenance of way and structures for Missouri is, $2,784.00.

Burlington's expense for maintenance of way and structures is 26.16 per cent of the entire expense of its system.

Burlington's expense for maintenance of way and structures for Missouri is 30.71 per cent of the entire expense for Missouri.

From this it would seem there has been an effort by a well planned system of cost accounting to consume with the

pencil the revenues of the Burlington earned in Missouri. Although the Missouri mileage is only 10.67 per cent of the mileage of the system and on ground more favorable to railroading, yet we find the Missouri operating expense is 18.60 per cent of the total expense of the system. That the per cent of expenses assigned to Missouri when compared with its mileage per cent is practically double.

From this we find that while the expense per mile for the system is $4,773.00, yet there is assigned to Missouri Exhibit 98, printed record, 5191) $9,065.00 per mile, or practically twice as much for operating expense. From this we find that the expense for *"maintenance of way and structures"* for the system is only $1,202.00 per mile, while under the road's said exhibit there is assigned to Missouri an expense of $2,784.00 per mile, more than twice as much as to this one item and which item we have assaulted and wherein the road has made an increase for Missouri of over 81 per cent.

Is it not enough to condemn the accuracy of the unexplained, radical and abnormal expense accounts assigned to Missouri operation?

Exhibit 98 and exhibit 100, Vol. V, pp. 5090, 5096, were filed by Mr. Sturgis upon the last day of the trial of the case. These are the exhibits which contain the enormous items of expense. They come unexplained in any way. Mr. Sturgis said they were taken from "the books," but it was the last day of the trial, and the "books" were five hundred miles away. The road must explain these expenses and give the items and details. They cannot give an enormous sum like $3,163,895.51 expense for maintenance of way and structure and expect the court to accept it and receive it, for the purposes of overthrowing the law. (Chicago & Grand Trunk R. R. Co. vs. Wellman, 143 U. S. 739.) This statement and these exhibits increase the operating expenses in Missouri from

that of 60 per cent (p. 4748) in 1904, to 82 2-3 per cent in 1908, or an increase of nearly 24 per cent, with a panic on hands and general business depression felt everywhere.

We naturally ask ourselves, are these figures of expense correct? Are they not made for the occasion? Are they not made for this lawsuit? We turn to the record which will warrant this court in saying it is not satisfied with the proof as to the expense.

The only analysis of the expense made by Mr. Sturgis was that the statement was "taken from the books, it is the figure that represents the correct figure." Let us see. The Burlington for the fiscal years 1904, 1905 and 1906 made report under oath to the Railroad and Warehouse Commissioners of Missouri in compliance with section 1070, R. S. Mo. 1899, now section 3089, R. S. Mo. 1909, giving to said Commissioners, "A statement in detail of the affairs of such company or corporation as the same existed on the 30th day of June, first preceding and of the business operations of the business operations of such company or corporation for the year ending June 30, as aforesaid."

These reports for the said years in compliance with said statute were filed by the Burlington (Vol. II, p. 1321, et seq.). In the report filed for the year 1904, under the head of "*Earnings from operation—State of Missouri,*" recites, "*We have no record showing Missouri figures separate from those of other states;*" and under the heading of "*Operating expenses—State of Missouri,*" the recital is, "*We have no records showing Missouri figures separate from the rest of the road.*" And, so as to details of operation, train, ton and passenger mileage, and the earnings and expenses per train, ton and passenger miles, etc., the report is only, "*We have no record showing Missouri figures separate from other states.*" The report for 1905, is the same way and for 1906, simply a blank. In fact its sworn reports have never given the information for any year. Mr. Sturgis does not disclose where

now how he gets the figures. He merely says, "It is taken from the books. It is the figure that represents the correct figure." (Vol. V, 4751.)

Now then, when Mr. Sturgis swore that the figures in exhibit 98 and 100 were taken from "The books," and when the road's proper officer swore in his statement to the Railroad and Warehouse Commissioners, that *"We have no record showing Missouri figures separate from the rest of the roads,"* and *"We have no record showing Missouri figures separate from those of other states,"* then let him tell us which is true. Let him tell us how he could have taken this colossal and abnormal expense from "The books," when the books did not disclose any such information. From what books were they taken? Does this not call for some explanation? It is abnormal. It is unusual. It breaks all precedents. The figures can not prove themselves—the road can not name a lump sum and call it proof. This court requires it to do more, and common justice can not be satisfied with anything else.

We now propose to make another and our last table, showing net returns. Not that it is necessary, because the returns figured on any and every basis disclose that in each instance the net returns to the Burlington are greater than either the legal rate or the contract rate of interest in Missouri. This last table will be made on the basis that the expense account has been ten per cent too much, as we have endeavored to show. At least the most probable expense under the evidence would be the per cent shown upon the system (71.08 per cent) and not 82 2-3 per cent. The expense in Missouri has always been less than the expense for the system. The court can not accept their bare statement unaccompanied by any proof or showing. The statement is radical and extreme and contrary to the actual test of operation heretofore and as reported by the road. It has attempted to consume the revenue by manipulating its cost accounting. If the expense for Missouri is ten per cent too much to get

the proper net return in each instance, you must add to the net returns ten per cent of the expense. As to the State freight under example No. 1, the net earnings, when the ten per cent of the expense is added, are $850,074.03; under example No. 2, the net earnings are $684,496.89; and under example No. 3, the net earnings are $581,366.63. As to the State passenger traffic, the net earnings in example No. 1, would be $505,556.33; and in example No. 2, the net earnings would be $592,788.12; and in example No. 3, the net earnings would be $672,869.19. These figures, then, give us the following table of net returns, on the value of the property employed with the franchise value deducted. (Divide net freight earnings in each instance by $5,603,068.58 for net per cent on freight returns, and divide net passenger earnings in each instance by $6,811,146.76 for net per cent on passenger traffic.)

TABLE SHOWING NET RETURNS ON THE BASIS THAT THE ROAD'S EXPENSE ACCOUNT IN ITS EXHIBIT NO. 98 IS EXCESSIVE BY TEN PER CENT.

Return State freight even basis as to cost	15.17%
Return State passenger even basis as to cost	7.42%
Return State freight and passenger traffic together	10.92%
Return State freight, 30 per cent extra cost basis	12.21%
Return State passenger, 10 per cent less than interstate cost basis	8.70%
Return State freight and passenger traffic together	10.29%
Return State freight, 50 per cent extra cost basis	10.37%
Return State passenger, 20 per cent less than interstate cost basis	9.88%
Return State freight and passenger traffic together	10.11%

It can no longer be doubted for a moment but what the road's net returns upon its State freight and State passenger traffic separately considered and when taken together give it a return far beyond what any court would say was a fair and reasonable return.

The balance of this brief will be devoted to a challenge of the findings of the court, the amount of the road's expense, its method of dividing the expense between State and interstate traffic and like questions. We shall discuss these questions first as applied to the freight acts, and, second, as applied to the passenger act.

PART III.

CHALLENGE AS TO THE CORRECTNESS OF THE FINDINGS OF THE TRIAL COURT, THE METHOD OF DIVIDING THE OPERATING EXPENSE BETWEEN STATE AND INTERSTATE TRAFFIC, THE AMOUNT OF OPERATING EXPENSE CHARGED TO MISSOURI, THE CHARACTER OF EVIDENCE RECEIVED, THE ABSENCE OF PRIMARY OR BEST EVIDENCE, ALTHOUGH WITHIN THE KEEPING OF THE RAILROAD AND LIKE QUESTIONS AS APPLIED, FIRST, TO FREIGHT RATES, AND, SECOND, TO PASSENGER RATES.

FREIGHT—DIVISION OF EXPENSE BETWEEN STATE AND INTERSTATE.

I.

THE COURT SHOULD NOT HAVE DIVIDED THE TOTAL FREIGHT EXPENSE BETWEEN STATE AND INTERSTATE TRAFFIC UPON THE BASIS OF GROSS REVENUE; AND CERTAINLY SHOULD NOT HAVE ADDED 50 PER CENT TO THE EXPENSE OF HANDLING STATE FREIGHT IN ADDITION THERETO.

A.

The court divided the expense of the freight business between State and interstate traffic on the gross revenue basis, and charged 50 per cent additional to the State freight expense. (Record, p. 5310.) It is admitted (Exhibit 36, Vol. II, p. 1414), that the gross revenue per ton received from State freight is twice as large as that received from interstate. In other words, it is admitted that the State rate is twice as much as the interstate rate. This being true, then, dividing the expenses between State and interstate traffic on the revenue basis charges State freight per ton with twice as much expense as the expense charged to interstate freight. That because the State rate is double that of interstate, therefore, the State freight expense account must be charged with twice as much. The road might be hauling in the same train, perhaps, in the same box car two articles just like, one coming from without the State and the other placed in the car within the State, and both to be delivered at the same point within the State, and for each mile these two articles move together, the court charges the State article with exactly twice the expense it charged the interstate article, although, the fact is,

that the actual expense for the same number of miles they traveled was exactly the same. The mere statement refutes the court's position, it needs no argument.

But that is not all the court did; it added an additional 50 per cent. (Record, p. 5310). Just think what that means. On the gross revenue basis for division of expense adopted by the court, that basis alone charged to State traffic twice the expense per ton that was charged to interstate traffic. The adding of the 50 per cent charges, the *State traffic* with *three times* the expense per ton that is charged to *interstate traffic*. It is so *arbitrary* and *radical* it can but receive condemnation and shocks one's sense of justice and reason.

Let us illustrate it by example: Say Brown ships corn from Kansas City, Kansas, and also from Kansas City, Missouri, to Jefferson City, Missouri. The gross revenue received for the shipment of corn from Kansas City is $20.00. The gross revenue received for the shipment of corn from Kansas City, Kansas, is $80.00. The expense for shipping both was $70.00. The State shipments is 20 parts of the whole and the interstate is 80 parts of the whole. The expense under the finding of the court is divided in the following absurd way:

Multiply the 20 parts representing State freight by 3 (because State freight is to be charged with three times the expense), this gives you 60. Now, 60 plus 80, equals 140. The State expense is then 60/140 or 3/7 of $70.00, which is $30.00; and, the interstate shipment is charged with 80/140 or 4/7 of $70.00, which is $40.00. On this basis, the road lost $10.00 on its State shipment and cleared $40.00 on its interstate shipment. In other words, half of its gross earnings was net profit. If the road was having a hearing before the *Interstate Commerce Commission* on such a proposition, it would unquestionably brand as *radical and absurd such a basis for division of expenses.*

Again, the expense cannot be divided on the gross revenue basis, because the *factors are not even.* The *main factor* to be considered is *twice as great* in the one instance per ton as it is in the other. With this being true, elementary logic and mathematics should tell one you cannot divide the expense on the *revenue basis,* lest you burden one with an unjust expense and relieve the other of an expense which it must justly bear.

If the court's basis of dividing the expense is correct, then it costs just *three times* as much *per ton* to handle State as interstate traffic, no matter whether it be hay, grain, coal, rocks or watermelons. If then the legislature should, tomorrow, *double the States rates,* the legislature would by that action, *ipso facto, double the expense* for handling State freight, and the court must then say, it costs *six times* as much to handle *State* freight *as interstate* freight, although the fact is there was no actual change in the cost or expense whatever. The basis is reduced to an absurdity.

Again, if the road should run an interstate train free for one month and should operate a State train as usual, then there would be no revenue from the interstate train and in the division of expense between State and interstate traffic under the road's contention and the court's finding the whole expense of operating the two trains must be borne by the State train or assigned to the State traffic. If both trains should be run free of charge for a month there would be no revenue, consequently no revenue basis for the division of expenses. Upon what basis would the court then divide the expense? Unquestionably on the ton mile or passenger mile basis.

There can be no question in the minds of this or any other court as to the accuracy of the statements of the late Mr. Justice Brewer in the case of Ames vs. Union Pacific Railroad Company, 64 Fed. 182, in addressing himself to

this same subject, and wherein he held there was no relation between expenses and revenue, and that under changed conditions as to rates.

> "Obviously the cost of transportation would be the same, whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by House Roll 33."

This ought to clearly demonstrate to the court the manner in which the application of the revenue theory will, under differential rates or in any event where the rates are not on an absolute equality work a hardship on one or the other in accordance with the general disparity between rates, when the expenses are apportioned on the ratio that the gross revenue of the one bears to that of the other. The factors are not equal. A division of expense with unequal factors is bound to be wrong.

The late Mr. Justice Brewer, in Chicago, Milwaukee & St. Paul Railroad Company vs. Tompkins, 176 U. S. 176, reversed the case because of the application of the revenue theory in finding values, and shows by an example how absurd the theory becomes when thus applied, saying:

> "Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one-half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent.

> The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving $500,000 the company only received $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns six per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business—six per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced."

If you can not use the revenue theory to find values neither can you find expenses, an equally important factor in the problem.

In the case of Atlantic Coast Line Company vs. Ellis, 203 U. S. 256, at page 260, the late Mr. Justice Brewer, speaking of this difficulty, used this significant language:

> "We are aware of the difficulty which attends the proof of the cost of transporting a single article

and in order to determine the reasonableness of a rate prescribed it may sometimes be necessary to adopt as a basis the average rate of all transportation *per ton per mile.*"

The complainant cites the case of Smyth vs. Ames, 169 U. S. 466, as an authority for the revenue theory. It is not an authority upon that proposition. The revenue theory was not presented to the court. The court had no opportunity to make a choice as to theories or bases upon which to make a division of expenses between State and interstate traffic. A reading, however, of the opinion discloses that the property was divided upon the mileage basis and the expenses upon the basis of the *per ton per mile.* At page 529 Mr. Justice Harlan, in speaking of the alleged extra cost of carrying local freight, says expressly that the extra cost of local as against through freight is so much *per ton per mile.* The tables on pages 530, 531, 532, 536 and 538, in said opinion, are all figured upon the basis of carrying *one ton of freight one mile and one passenger one mile;* that is, the freight *per ton per mile and the passenger per mile.* This Honorable Court has never passed away from this *per ton per mile and passenger per mile method.*

B.

GROSS REVENUES AND EXPENSES DO NOT MOVE TOGETHER.

The gross revenues and the expenses of operating a railroad do not move together. This is well established from the reports of the Burlington made as heretofore stated under the Hepburn Act. On pages 68 and 69 of said Bulletin No. 5 of the "Revenues and Expenses of Steam Roads," issued by the Interstate Commerce Commission, we find from the Burlington's reports on said pages the following:

Burlington's gross revenue year ending June 30th, 1908, was $77,748,161.52.

Burlington's total expense year ending June 30th, 1908, was $55,268,407.48.

Burlington's gross revenue year ending June 30th, 1909, was $78,612,629.36.

Burlington's total expense year ending June 30th, 1909, was $54,636,697.77.

From this we find that the gross revenue for the year 1909 increased $864,567.84 over the gross revenue of the Burlington for the year ending June 30th, 1908. That the operating expenses of the Burlington for the year ending June 30th, 1909, were $631,709.71, less than the operating expenses of the Burlington for the preceding year. In other words, in comparing 1908 with 1909 instead of the gross revenues and operating expenses moving together, we find that the gross revenues *increased* over $800,000.00, and for the same year the expenses *decreased* over $600,000.00. In other words, we find them in the same year instead of moving together moving exactly in opposite directions, and the

divergence or spread totaling $1,496,277.55. This is not only true as to the comparison of the years, but will also be found to be true as to a comparison of the monthly reports. Thus by the Burlington's own reports we again reduce it to a monstrous absurdity. Again do we hoist it upon its own petard.

Judge Trieber, in St. Louis Southwestern Ry. Co. vs. Allen, 187 Fed. 291, finds that the gross earnings method must be wrong. He says (p. 321):

> "The straight revenue theory, as advanced by the learned counsel and accountants of the railroads is clearly wrong, as none of them take into consideration the increased rates charged for the intrastate traffic. No further proof of the fallacy of this theory is required than the examples and calculations of the accountants for the railroads in the exhibits filed with their testimony. Mr. Nay, who, at the time he testified, had thirty-seven years' experience as a railroad accountant, having begun as a clerk of statistics, and was at the time his testimony in these cases was taken, the comptroller of the Chicago, Rock Island & Pacific Railway Co., one of the great railroad systems of the country, gave the following illustration for the purpose of establishing the correctness of his theory and to controvert, as he states, 'an argument which is sometimes used to the effect that using the revenue basis is like traveling in a circle, and those who take that position claim that when the revenue of intrastate traffic is doubled the operating expenses are also doubled and the end is just the same as in the beginning.' He thereupon gives the following illustration to demonstrate the fallacy of that argument, as he states:
>
> "'First take for illustration a small railroad

with freight operating revenue of $100,000 and freight operating expenses of $80,000, of which the intrastate freight traffic is $25,000 and the interstate freight traffic is $75,000. We have the following statement:

	Intrastate.	Interstate.	Total.
Operating freight revenue	$25,000.00	$75,000.00	$100,000.00
Operating freight expenses, divide the expense between the intrastate and interstate on a revenue basis and it would be as follows	20,000.00	60,000.00	80,000.00
Net operating freight revenue	$5,000.00	$15,000.00	$20,000.00

"'Suppose that the rates on intrastate freight traffic are increased so as to exactly double the intrastate freight revenue, leaving the interstate freight revenue just the same, and the operating freight expenses exactly the same, an impossible condition in actual practice, but the extreme condition is used in order to emphasize the error of the argument that doubling the intrastate revenue in such a case would double the intrastate expenses. After doubling the intrastate freight revenue just mentioned we would have the following statement:

	Intrastate.	Interstate.	Total.
Operating freight revenue	$50,000.00	$75,000.00	$125,000.00
Operating freight expenses to intrastate revenue nearly 40 per cent of the total revenue, the operating expenses of $80,000.00 divided on the revenue basis would now be.	32,000.00	48,000.00	80,000.00
Net operating revenue	$18,000.00	$27,000.00	$45,000.00

" 'From this it will be seen that although the intrastate freight earnings were increased $25,000.00 after the intrastate tariff rates had been raised 100 per cent without any increase in expenditures, in the final result it is the beneficiary to the extent of $13,000 only, while the interstate earnings, with no increase in these rates, increased $12,000.' "

The inevitable result of the gross revenue theory is to announce the proposition that if the State traffic has no earnings it has no expense. That if the states would only place the rates low enough there would be no confiscation.

It is capable of demonstration to a mathematical certainty that the gross earnings basis is absolutely fallacious. Under the gross earnings basis, which assigns the operating expenses, for instance, as between the freight and the passenger traffic on the percentage which the total gross earnings

from each class of traffic bears to the total gross earnings within the state, the higher the rate in any particular class of traffic, the higher the assignable portion of the operating expenses to that traffic.

For the purpose of further demonstration, we will assume that the total gross earnings of the railway company in any state amount to one million dollars, and that this is contributed to equally by each class of traffic, which would make the total gross earnings from the freight traffic $500,000, and the total gross earnings from the passenger traffic $500,000. It is a well known fact that the operating expenses of any particular class of traffic do not increase in proportion to the increase in business. Instead of charging the rate for the transportation of freight under which this earning is produced, let us again assume that the freight rates are advanced 50 per cent, but, under the advanced freight rates the identical traffic is hauled which produced, under the old rates, a gross earning of $500,000, and we have an income under the new rate of $750,000 without one single item of increase in the operating expenses.

Assuming, now, that the rate of fares charged to passengers is reduced 50 per cent and identically the same amount of business is conducted under the same conditions, the same number of passengers hauled on the same number of trains for the same distances, and under the reduced rate, we have a gross earning in the passenger traffic of $250,000; yet, within the State, the total gross earnings from all classes of traffic is the same, or one million dollars. Let us now see what has been the effect of the increase in freight rates and the reduction of passenger fares upon the assignment of the operating expenses as between the freight and passenger traffic on the gross earnings basis. We now find that the gross freight earnings bear a relation of 75 per cent to the total gross earnings within the State, and under the gross earnings basis 75

per cent of the operating expenses should be assigned to the freight traffic, and as the gross earnings from the passenger traffic under the reduced rate bears the relation of 25 per cent to the total gross earnings within the State, then the balance of the operating expenses, or 25 per cent, would be assigned to the passenger traffic. It must be borne in mind that at during this period, while the increased freight and the reduced passenger rates have been in effect, there has been absolutely no change whatever in the operating expenses of either class of traffic. The same trains have been operated and between the same points; the same identical amount of freight has been hauled at the same identical expense; the same number of passengers have traveled in the same number of trains for the same distances at the same identical expense as during the time when the higher rates were in effect; yet, under the gross earnings basis, without any effect whatever on the actual operating expenses, the proportion of operating expenses has been increased from 50 per cent to 75 per cent in the freight traffic, and has been reduced from 50 per cent to 25 per cent in the passenger traffic.

Again, we will assume, for the purpose of illustrating, that the total gross earnings for the freight traffic are $500,000.

Under this state of facts let us assume that the passenger fare is raised from three cents to ten cents per passenger per mile, and while this higher rate is in force, for, say a period of one year, the same number of passengers are carried under the same conditions, on the same trains, for the same distance, so that there is no difference whatever in the actual operating expenses, insofar as it is applied to the operating of passenger trains. With the same number of passengers, at the increased rate of 10 cents per passenger per mile, we have increased the gross earnings of the passenger traffic over the present rate three and one-third times, so that the revenue

derived from the passenger traffic is now $1,666,666.67. The gross earnings from the freight traffic remain the same. By reason of the increased rate, the gross earnings from the passenger traffic are now three and one-third times what they were before the increased rate went into effect, with the consequent result that the advancement of the rate raised the percentage which the total gross passenger earnings within the State bears to the total earnings, and to that extent assigns the greater proportion of the operating expenses to the passenger traffic without, as a matter of fact, making one single dollar's difference in the true expense.

Again, let us assume that during the time of the inquiry the gross earnings from all classes of traffic remain at one million dollars, and under a three-cent rate then in effect the earnings from the freight and passenger traffic are $500,000 each. We will now reduce the rate on the passenger traffic from three to one cent per passenger per mile, assuming that no greater number of passengers are carried. What is the result? Under this reduced rate of one cent per passenger per mile, exactly the same volume of traffic is conducted for the year that the three-cent passenger fare has been in effect. The same number of trains have been operated at the same identical expense, and the same number of passengers have been carried the same distances. There is no actual change in the expense of operating the passenger business during the year that the one-cent rate has been in effect from the operating expense during the year while the three-cnt rate was in effect, but the income has been reduced two-thirds. The income from the passenger traffic under this one-cent rate is now $166,666.67, while the freight traffic remains at $500,000. Under the gross earnings method the proportion of the gross earnings from the passenger business is about 25 per cent of the total gross earnings in the State, and the effect of this would be to assign to the freight traffic 75 per cent of

the operating expenses and to the passenger traffic 25 per cent; but, as a matter of fact, in the actual operating expenses, as between the two classes of traffic, there would be no change whatever.

Again, assuming that during the period covered by the inquiry the gross earnings from the freight traffic remained at $500,000, and the passengers were carried free of charge, but the same number of trains were run the same distance, and the same number of passengers were carried for the same number of miles. Under this method, whereby passengers were carried free of charge, there would be no gross earnings in the passenger traffic, and, consequently, all of the operating expenses in the particular state would be assignable to the freight traffic and there would be no operating expenses assignable to the passenger traffic. We submit that the foregoing illustrations demonstrate that the gross earnings basis is a mathematical absurdity.

The question naturally presents itself, upon what evidence did the court base any such finding.

The roads, although possessed of the figures which would show the *actual cost* of handling *State* freight and the cost of handling *interstate freight*, preferred to offer as evidence the opinions, estimates and guesses of witnesses which it attempted to palm off as experts. These so-called experts were officers of the roads and their evidence discloses that it was not based upon *any facts* or *figures* nor upon *trial* or *tests*, but were mere opinions expressed off-hand and backed by reasons which were without reason and upon the whole the evidence is absolutely without any probative force. The evidence did not relate to cost of *State* and *interstate* traffic, but to *local or way trains* as compared with *through trains*. This freight in *local or way trains* is more than half interstate freight, pp. 4608-17, and exhibit 41, pp. 4935-8. The accountants offered by the

State contradicted this evidence and showed conclusively that it was fallacious. Here is the evidence of the road and upon which the court based its findings as to division of expense on the revenue basis:

C.

RAILROADS' EVIDENCE AS TO RELATIVE COST OF LOCAL BUSINESS AND THROUGH BUSINESS.

Charles Sturgis, Auditor of the Burlington, said it costs, "from three to seven times" as much to handle *local business as through business.*

Howard Elliott, President Northern Pacific (Vol. I, p. 425), said "I think it is rather difficult to say exactly; I should say anywhere from three to six or seven times greater for *local business* as compared with *through,* depending on the class of the branch and the amount of business on the branch. Q. Do you mean by the expense of handling a ton of freight per mile in your *local freight* business was three to six times as much as the expense of handling a ton of freight per mile in the *through* freight business? A. In a general way, yes. Q. You are not undertaking to make any comparison between expenses in proportion to revenue? A. No."

Mr. Rawn said (Record, Vol. I, p. 568):

"A. In my experience and the basis upon which we predicate our cost of operation, the cost of handling *local freight,* as we term it, in comparison with that which we term *through freight,* and in accordance with our statistics in the matter, we find that the direct train cost for exclusive train operation, which I shall endeavor to deal with as one item, and with other items separately—*the direct exclusive train cost, of* that which we term *local freight,* is about *three and a half* times that of handling *through freight.* That is, I reiterate, what we term exclusive train cost, or direct train cost."

Mr. Rawn declined to express any opinion as to the relative expense of handling State and interstate freight.

Darius Miller, Traffic Manager of the Burlington, said:

"I have only seen part of the testimony, but I understand it is on the revenue basis, which seems to me that is fair and reasonable as any basis. (Vol. I, p. 607.)

Mr. Stuart, General Manager Erie Railroad (Vol. I, p. 691): "Q. Take for instance, how much more does it cost to do the *State business* that the *through interstate* where the stuff does not stop at all? A. Well, based upon my general experience, I should say it cost from five to eight time more."

Mr. Stith, Traffic Manager Missouri Pacific (Vol. II, p. 1492), said: "I have a general idea about that, Mr. Clardy; I do not know that I could give you any definite figures. My *impression* of the matter and *understanding,* has been the result of my connection with the business. I don't know that I have any detailed figures to submit—but it has always been my *idea* about it, that the cost of doing the *purely local business* was very substantially greater than the cost of doing *through business.* And it has always seemed to me that the cost would be up to fully two and one-half times as much."

Mr. Doddridge, General Manager Missouri Pacific (Record, Vol. II, p. 1596), said: "In my judgment *State business* costs at a maximum, three times as much as the *through busines,* and it may reach six or more times. Or, in other words, from three to six or more times."

Mr. Clark, Superintendent Missouri Pacific (Record, p. 1631): "Q. Do you mean by that, it costs four or five times as much to carry a ton of State freight as a ton of interstate freight? A. Yes, sir. Q. That would be on the *per ton per mile basis?* That is, a ton of freight for each mile carried, that it would cost the company *four or five times,* I understand you to say, as much to carry a *ton of State freight one mile* as a *ton of interstate freight one mile?* A. *Yes, sir.*"

Mr. Willard said (Record, Vol. I, p. 511):

"A. In saying what I have about the relative cost of doing the business, I have not had in mind at any time the

revenue received from the business, because I know nothing about it. So, when you speak of the relation of the earnings (expenses?) to revenue, I have no answer to make. I have no definite knowledge about it."

W. T. Fisher, Weigher in Missouri Pacific Railroad (Record, p. 1752), said: "A. *It costs from two to six times as much to earn a dollar* in State freight business as to earn a dollar in the interstate business." And yet, in the next breath (p. 1753), he says he does not take revenue into consideration. "Q. Then why would you say two to six times, putting it all on that basis? A. I said a little while ago, that the reason for the difference in two to six times, is to take account of the variation of interstate freight carried on local trains and State freight carried on through trains. Q. On that basis now, do you take into consideration the rates received for the carriage of State freight as compared with the rates received for the carriage of interstate freight. A. *No, sir; we are dealing only with the cost* of doing this business now. Q. You do not take into consideration the rates on the two different classes of freight? A. *No, sir; I have not taken that in.*"

Mr. Bethard, General Manager M., K. & T. (p. 1824, Record), said "I should say it would cost four or five times as much, *just off-hand,* I have never gotten down to actual *figures.* That would be an estimate."

Mr. Miller, General Manager Wabash (p. 2829-30, Record): "I should say that the business in Missouri would cost to handle it two or three times as much as the interstate or *through business,* as it is handled on the railroads. That is my impression" (p. 2811). "Q. Do I understand your opinion is based entirely upon the cost of doing the business *without regard to the rates charged?* A. *Entirely on the cost.*"

Mr. Gray, General Manager St. Louis & San Francisco (p. 3931, Record): "My *best conclusion* on that, is that it

costs from three to five times as much to do the freight business which is purely State, as it does to do the *interstate and trans-state jointly.* Q. On what basis do you give these figures? The *ton mile* basis or the *revenue basis?* A. *I really had no particular basis in mind.*"

Mr. Tyler, Superintendent St. Louis & San Francisco R. R. Co. (p. 4101, Record): "I think the difference in cost is somewhere between three and five times as great." On page 4128, he said: "I have no reference at all to the question of the *earnings of a certain amount* of *the question of revenue at all.*"

Mr. Whittenton, Superintendent Chicago, Rock Island & Pacific (p. 4157, Record): "What I mean by that was this expense in connection with earnings may be about two to one as between the two classes. Q. That is to say, it would cost about twice as much to earn a dollar in State as in interstate business? A. Yes, sir."

Mr. McPherson, Assistant General Manager of Missouri Pacific (p. 4288, Record): "How much more is the extra cost of handling State freight than interstate freight, how many times? A. Their relation in dollars and cents would be very difficult to determine. We know they exist so that the excess cost is between, in my judgment based on my experience, four and eight."

This is the sum total of the evidence upon which the court rests its findings, that the expense between State and interstate should be divided upon the gross revenue basis.

Practically every witness declared that his opinion, impression and guess hazarded, was not upon the *revenue basis* and in fact, disclaimed that it was so based. We recall but one witness (Darius Miller), who said that the rates or revenue was considered. They seemed to have no *definite* idea or knowledge about the expenses one way or the other. They seemed to have *no practical knowledge* of what was meant by the stilted formula, "*three to six times as much,*" "*two to*

four times as much," "*four to eight times as much,*" "*two times as much,*" "*three to seven times as much,*" which they ceaselessly reiterated, but always with a minimum figure large enough to suit any theory which might seem plausible.

Nearly every man fixed his estimate on a comparison between *local business* or *way trains* with *through business* or *through trains.* They did not base the estimates as to the relative cost of *intrastate* freight and *interstate* freight. The record discloses that this *way train* which was so expensive, carried by *actual test,* 63 per cent interstate freight and 37 per cent State freight. (Exhibit 14, p. 2401 and pp. 1621-2 and p. 1159, Record.) So in unloading this enormous expense upon the *way train* or *local freight train,* the witnesses have all unwittingly loaded this "three to six times as much," "four to eight times as much," etc., on the *interstate* commerce. Thus, they are hoisted upon their own petard.

Again, the less than carload State freight which the roads say must be peddled out along the roads, and which they say is the cause of this colossal expense, *is only* 1.32 *per cent of the total freight business in Missouri.* (Vol. II, pp. 1414-15, exhibit 36, line 15.) How is it possible for an item which is *only* 1.32 *per cent* of the total freight business of the Burlington in Missouri to become the bugbear or scapegoat to carry away a fabulous expense account?

If these officers of the roads who attempted to testify as *experts,* possessed no more *technical knowledge or information* upon the subject about which they were testifying, than to say that the cost was from "three to seven times as much" or "two to six times as much," then these gentlemen confess they possess no *information,* and their evidence is without probative force. If they have no more information than from three to seven times as much or two to six times as much, that is no information, and they have imparted no knowledge. They should have produced the figures and the evidence showing

the actual cost, and which evidence was within their keeping.

Complainant's witnesses in attempting to justify their estimates, gave the following as the principal reasons why the way train was more expensive than the through train. (This was on the theory that the entire expense of the *way train* would fall on State freight. *Tests and facts* hereafter presented will show that *two-thirds of the entire freight* on the way trains is interstate, and *therefore two-thirds* the expense of such train must be borne by interstate traffic):

REASONS.

1. Length of haul of way train (52 miles), is less than through train (105 miles).

2. Way train has two terminal charges, and through train but one.

3. More waste space in way train than through.

4. Maintenance of sidetracks, tracks between division points, stations, etc., must be borne by way train.

5. Freight on the way train is handled more than on through train.

Each one of these reasons is fully answered in our main brief and would serve no useful purpose to notice same here.

Will say here, however, that Mr. Ludlam testified (p., Record 872) *that it costs more to handle interstate freight less than carload lots than it did State freight less than carload lots. Mr. Taliaferro testified to the same thing* (pp. 898-9 and 3022 of Record), *as did Mr. Bethard, Superintendent of Transportation of the Missouri, Kansas & Texas R. R. Co.* (pp. 1830-1, Record) *and Mr. Miller, General Manager of the Wabash Co.*

This is indeed significant in view of the court's findings and opinion.

II.

COMPLAINANTS' WITNESSES PROPOSED NO ACTUAL KNOWLEDGE OR INFORMATION ABOUT THE RELATIVE COST OF HANDLING INTRASTATE AND INTERSTATE FREIGHT, OR OF OPERATING WAY TRAINS AND THROUGH TRAINS, AND THE RECORD SO DISCLOSES.

The names of some of these witnesses are well known names. Some of them are chief or prominent in the management of successful railroad properties. And there are others holding less conspicuous, but most responsible positions, who have deserved them, who have earned them upon their merits. That they are capable men and successful men must be admitted, and is fully conceded. It is only justice to them to concede it, and not only to concede it, but to cheerfully declare it. They are capable and successful men, because as a result of their efforts and management the properties committed to their charge, in whole or in part, have been able to pay the interest upon their bonded indebtedness, and perhaps a satisfactory dividend to their stockholders.

But the attention of the managers of any railroad system is directed to the ultimate result, that ultimate result being the net profits from the operation of the system as a whole, including its entire territory, perhaps many states, including its entire operations, whether passenger or freight, whether State or interstate.

It has not been necessary for them, in their efforts to accomplish these results, to inquire whether it has cost more or less to transport in the same car one article of freight than another; much less to separate those articles into the two

classes of State and interstate freight. It has not been necessary, or even useful, in their management of the properties, to inquire how much of the contents of a way train or of a through train is State freight or interstate freight. Their subordinates, in loading cars with freight, have regard only to the point of its destination. It is immaterial to them whether that freight may be State or interstate. It has not occurred to railroad managers to inquire as to the relative cost of transporting State and interstate freight. Such knowledge has been neither necessary nor useful to them in the operation of their properties. It is, therefore, no reproach to them that they disclose their want of information, or gross misinformation regarding facts, material to the solution of the problem now before the court.

But the opinion of any man, to be accepted, must appear to be based upon his knowledge of facts. If a witness, therefore, offers an opinion which, to be valuable, must be based upon his knowledge of facts, and his testimony discloses that he either has no knowledge of the facts or that his opinion is based upon what he supposes to be the fact, when the fact is quite otherwise, we naturally reject his opinion. We cannot accept opinions as revelations appealing to our faith. There must be some substantial and visible basis of actual fact to support them. We do not accept opinions without reasons for them. And the reasons must appeal to our intelligence and our understanding. If the reasons offered seem far fetched, if their importance appears greatly magnified, we hesitate to regard them as adequate to support the opinion offered. In a matter of such great and general importance as that now presented to the court, if the issue on one side is supported principally by opinion evidence, it must be expected that the value of those opinions will be measured by the extent of the knowledge of material facts possessed by the witnesses who offer them.

It is therefore pertinent to examine this record with the

view of scrutinizing the qualifications or want of qualifications of the witnesses to give opinions upon which a decree annulling the law of a State can properly be based. Because the decree of the court below *rests upon opinion and not upon facts;* opinions, in many instances, of witnesses who either disclaimed knowledge or assumed to possess knowledge of material facts, as to which other evidence demonstrated they had no knowledge whatever; whose assumptions were not even approximations of the actual facts.

Mr. Willard, vice-president of the complainant, had no idea and no information upon which to base an idea upon the important question as to relative tonnage of State and interstate freight on way and through trains. (Record, Vol. I, p. 512.)

He did not know and had no idea of the average length of haul in Missouri (pp. 527, 531).

He thought that less than carload freight, destined for the west and received by his company at St. Louis from one of its eastern connections, would not be unloaded at St. Louis and reloaded into another car on his road.

But all the evidence shows to the contrary.

And yet Mr. Willard, with misinformation, or total want of information regarding such material facts as these, does "not hesitate to say that in my opinion" the cost of doing State freight business "is not less than three times" that of interstate. (Record, Vol. I, p. 494.)

Mr. Elliott does not know the percentage of State freight on through trains, or on way trains (Record, Vol. I, pp. 431, 481, 483), or the percentage of less than carload business (p. 438).

Darius Miller, vice-president of the complainant, who gave his opinion that the cost in the State freight business was three times as much as in interstate, had no definite

knowledge as to the proportion of State and interstate freight in *way trains*. (Record, Vol. I, p. 608.)

Mr. Sturgis, the General Auditor of the complainant, who had testified that the State business cost three to seven times as much *in proportion to revenue*, as the interstate, said he knew nothing about the relative proportion of rates on State and interstate traffic in Missouri. (Record, Vol. I, pp. 368-9.)

He knew nothing about rates and said: "I don't see a rate in a year." (Record, p. 333.)

He had no knowledge of the manner of handling the traffic or what percentage of business on local trains was State and interstate. (Record, p. 336.)

He knew nothing about the distribution of empty cars, saying: "That is not my business at all; that is only a general supposition I am giving you." (Record, p. 336.)

He knew nothing about the comparison between State and interstate rates and reiterated that he, "does not see one rate in a year." (Record, p. 337.)

He said profit or loss on local business had nothing to do with the relation between local and through rates. (Record, p. 338.)

He did not know the amount of less than carload freight in interstate or State freight. (Record, p. 339.)

He did not know the rule with regard to the abandonment of freight trains when insufficient traffic is offered and did not know which was more profitable, local or interstate business. (Record, p. 341.)

He did not know anything about the manner of running freight trains. (Record, p. 342.)

He said he could not find a relationship between intrastate and interstate tonnage because the railroad did not have the way bills from which to determine it. (Record, p. 343.)

He did not know the average haul of local freight and said he could not ascertain it. (Record, p. 350.)

He could not tell the average ton mile haul of interstate freight nor separate it from the whole. He estimated the average intrastate haul at between eighty and one hundred miles, but said: "It is not based on actual record of movement." (Record, p. 351.)

He said the local freight expense for 1905, could not be determined. (Record, p. 363.)

He had no idea and could not even approximate the percentage of carload and less than carload freight. Nor had he any idea as to what percentage of the total intrastate business was less than carload. (Record, p. 366.)

He knew nothing about the relationship of one to the other nor had he any idea of the relative proportion so they could be expressed in figures. (Record, p. 367.)

He knew nothing as to the disparity of rates on the two kinds of traffic, but says that at an outside limit it might be double and that his basis was made without knowledge of rates. (Record, p. 369.)

He said that the way bills for July and August, 1906, were not to be had, this testimony was given in September, 1906. (Record, p. 387.)

In speaking of the handling of the traffic, he said he did not know the ton-mile cost nor whether the handling of traffic was measured by the revenue or on an imaginary or estimated ton-mile basis. (Record, p. 392.)

He did not know the percentage of State freight and said the tonnage cut no figure at all. (Record, p. 394.)

He had made no calculation nor had any made, which would show the revenue which would have been received by the company in 1904 and 1905, had the rates authorized by the Board of Railroad and Warehouse Commissioners been in effect.

He said, "I have not any idea at all, not the slightest," in speaking with reference to the interest earned by the sinking fund. (Record, p. 728.)

He said, "I have not any idea at all, not the slightest," in speaking with reference to the interest earned by the sinking fund. (Record, p. 728.)

H. G. Clark, superintendent of one of the divisions of the Missouri Pacific Railroad, who had testified that in his opinion the State freight cost was four or five to one, had no opinion of the relative volume of the different classes of freight on his road, or of the relative proportion of carload and less than carload lots, but assumed that the *way trains* carried a larger per cent. of State than of interstate freight. (Record, Vol. II, 1632.) He would not even assume, for the purposes of a question, that the *way trains* carried more interstate than State freight (pp. 1633, 1639), although the performance of trains on his own road showed 63 *per cent. interstate and only* 37 *per cent. State freight* (Record, Vol. II, pp. 1589, 1531), and although, as appeared later by the testimony of Mr. Peabody of the Santa Fe Company (Exhibits 41 and 42, Vol. V, pp. 4935-8), that of the contents of *way trains* 69.8 per cent. in tons and 83.3 per cent, in ton miles was *interstate* freight.

Mr. Fisher of the Missouri Pacific Railway Company, who says it costs two to six times as much to earn a dollar in State as in interstate business, does not even take into consideration the rates on the two different classes of freight at all. (Vol. II, p. 1753.)

Mr. Bothard, Superintendent of Transportation of the Missouri, Kansas & Texas Railroad Company, testified that it costs four to five times as much for State as for interstate business.

It is interesting to inquire how much knowledge he possessed of material facts.

He said that 75 *per cent.* of the *State freight* business would be on the *way trains* and 25 per cent on the through trains. (Record, Vol. II, p. 1825.)

But the tests of Mr. Peabody of the Santa Fe Company showed that the *way trains carried only* 16.7 *per cent of the total State freight, and that* 83.3 *per cent of it was on through trains.* (Peabody's Exhibit 41 and 42, Record, Vol. V, pp. 4935-8.)

He thought that 98 per cent of the business on through trains was interstate freight, and 2 per cent State freight (p. 1826).

But in Doddridge's through trains, 7 per cent was State and 93 per cent interstate business. (Vol. II, p. 1589.)

He thought that of the freight on the *way trains* 95 per cent would be *State freight* and only 5 per cent interstate (p. 1826).

But in fact, on the Doddridge way trains it was 37 *per cent State and* 63 *per cent interstate.* (Record, Vol. II, pp. 1589, 1621.)

And on the Peabody way trains, State freight was 30.2 *per cent and interstate* 69.8 *per cent.* (Record, Vol. V, pp. 4935-8.)

He thought 40 *or* 50 *per cent* of the freight *on way trains* was less than carload. (Record, Vol. II, p. 1826.)

In fact, it is only 4 *per cent* (p. 1618).

And the opinion of this witness as to the extra cost to be charged to State freight is because of the great preponderance of State freight carried on *way trains* and of interstate freight on *through* trains. (Record, Vol. II, p. 1827.) But in this he was badly mistaken.

Mr. Rainey of the St. Louis & San Francisco Railroad Company was of opinion that it would cost "three or four times as much" to do State freight business. And yet this witness proceeded upon the assumption that 90 *per cent of*

the business on *way trains was State freight*, and that 40 *per cent of their entire tonnage was less than carload* (Record, Vol. II, p. 1843.) While we have seen that according to actual tests by Mr. Doddridge, *only* 4 *per cent* of the *way train* tonnage was *less than carload* (p. 1618), and that of carload freight only 37 *per cent was State freight* (p. 1589), and according to Peabody's tests, only 30.2 *per cent* of the tonnage of the *way trains* was State freight.

Mr. Miller, General Manager of the Wabash Company, said that the extra cost of doing State freight business in Missouri was practically the same on the Wabash, the Missouri Pacific and the Burlington railroads. (Records, Vol. III, p. 2831.)

He estimated that 25 per cent of the total ton miles of freight in Missouri was State business, while actual investigation made later on the Burlington (complainant's) road showed that the State freight percentage of ton miles was only 8.67 per cent (Exhibit 36, Record, Vol. II, pp. 1414-15), and a similar investigation on the Missouri Pacific showed the State freight ton miles to be only 13.98 per cent. of the whole. (Exhibit 19, Record, Vol. III, p. 2407.)

Mr. Miller thought the interstate business at Carrollton, one of the towns between division points on his own road, was a small part (Record, Vol. III, pp. 2865-6), while later investigation demonstrated that the interstate tonnage handled at that place was 5-6 as much as the State, or more than 45 per cent of the whole. (Record, Vol. III, pp. 2999-3001, Exhibit 28, Vol. III, p. 3362.)

He says that of the tonnage on the way trains the interstate freight is a small part (Record, Vol. III, p. 2268), and his estimate of increased cost is upon the assumption that by far the larger part of it is State traffic (p. 2896).

How greatly mistaken he was upon this point has already been seen.

He did not know the average haul in Missouri of either class of freight (p. 2871). And he thinks it right to charge to the State business a large part of the expense of the local stations and their facilities, because, as he says, "only a very small part comparatively is interstate business at the local station" (Record, Vol. III, p. 2877), while subsequent investigation by the State's expert disclosed the fact that at five stations on his road (none of them division points), the interstate freight handled in September, 1906, was 60 per cent of the whole, or, deducting that part of the St. Charles tonnage, consisting of manufactured cars, it was 53.34 per cent of the whole. (Record, Vol. III, pp. 2999-3001, Exhibit 28, Vol. III, p. 3362.)

Mr. Miller estimated the average tonnage of his through trains at 750 *tons* each, and his way trains at not to exceed 100 tons each. (Record, Vol. III, pp. 2913-14.)

Mr. Miller was greatly mistaken.

Mr. Taliaferro, one of the State's experts, afterwards investigated the subject. The wheel reports for the through trains for the last ten days of September, 1906, were furnished to him by Mr. Forsythe, the railroad company's Superintendent of Transportation. He found that the average tonnage of one of those through trains for ten days was *only* 351 *tons;* of another one, *only* 246 *tons*. His testimony shows the loading of many others of the through trains during that period. The average tonnage of all of them was *only* 300 tons, instead of 750, as Mr. Miller thought. Those were east bound trains.

He also investigated the west bound through trains. Their average tonnage was 270 tons.

And the average tonnage of all the through trains, both east and west bound, was 283 tons. He found no train that carried as much as 750 tons; the heaviest was 418 tons. (Record, Vol. III, pp. 3003-3007.)

A blue print, known as "Summary of Operating Statistics by Accounting Divisons, for the year ending June 30, 1906," had been offered in evidence by the company (Record, Vol. III, p. 2912, Exhibit 12, p. 3336). It disclosed the average tonnage of all trains, way and through, for the year, over certain portions of the line, from which Mr. Taliaferro drew the irresistible inference that the average tonnage of the way trains must be at least 200 tons (Record, Vol. III, pp. 3011-12), instead of 100 tons, as estimated by Mr. Miller.

Mr. Tyler, General Superintendent of 2,000 miles of the St. Louis and San Francisco Company's mileage, thought 80 *per cent of the tonnage of way trains was State freight.* (Record, Vol. IV, p. 4136). And that of the freight handled on through trains, only from 1 to 3 per cent. is State business (p. 4137).

How far from the actual facts these estimates were, is discovered by Mr. Hamilton's investigation of through and way trains on Mr. Tyler's own road, the result of which are *that* interstate freight was just *twice* as much as State freight. (Record, Vol. IV, pp. 4607-17).

And Mr. Tyler says that it is upon such estimates as these that he is led to his opinion as to extra cost (p. 4138).

Mr. Whitenton, who, for several years, was the superintendent of the Chicago, Rock Island and Pacific Railroad in Missouri, testified that on the revenue basis, it would cost twice as much to do State business as interstate; that is, it would cost about twice as much to earn a dollar. (Record, Vol. IV, pp. 4157-8.) This statement involved, of course, the consideration of the relative revenue derived from the two classes of business. But apparently unconscious of the sublime paradox resulting, he says, almost in the next sentence, when asked about the relation between State and interstate rates on his road: "I don't know a thing about rates" (p. 4158).

Mr. McPherson of the Missouri Pacific Railway Company said that the relation of the State *less than carload* traffic to all the *State* traffic was greater than the proportion of *interstate less than carload* to the total interstate in the ratio of about four to one on the ton miles basis of calculation. (Record, Vol. IV, p. 4292.)

Mr. McPherson doubtless believed this statement. And manifestly it was made to direct attention to the fact that the expensive less than carload business was found in very much larger proportion in the State than in the interstate business.

That it is found in larger proportion is true. But that the proportion is not so large as Mr. McPherson supposed is also true.

On the Burlington road in Missouri, the percentage of less than carload State ton miles to the total State ton miles is 11.1 *per cent.* The percentage of less than carload interstate ton miles to the total interstate ton miles is 5.6 *per cent.* (Exhibit 36, Record, Vol. II, pp. 1414-15.) The State proportion of ton miles is, therefore, a little less than twice as large, instead of four times as large, as Mr. McPherson thought.

Upon Mr. McPherson's own road, the Missouri Pacific, the percentage of less than carload State ton miles to the total State ton miles is 13.7 per cent. The percentage of less than carload interstate ton miles to the total interstate ton miles is 5.3 per cent (Exhibit 18, Record, Vol. III, p. 2407), the State proportion of ton miles being only about 2.6 times as large as the interstate proportion, instead of four times as large as Mr. McPherson said.

Mr. McPherson said that in State carload traffic, the loading is lighter than in the interstate carload traffic. (Record, Vol. IV, 4330.)

But Mr. Doddridge made an examination of the business

transacted at 88 stations upon Mr. McPherson's railroad, and produced a tabulated statement of the result, which was introduced in evidence by the Missouri Pacific Railway Company. (Record, Vol. II, pp. 1591, 1620, Exhibit 8; Vol. III, pp. 2390-2.) From this it appeared that the State carloads were the heaviest. State carload freight averaged 27 tons to the car, while interstate carload freight averaged only 22½ tons to the car. (Record, Vol. II, pp. 1881-2.)

These matters, in respect of which such glaring want of knowledge was thus displayed, are principal factors whose full comprehension and consideration are indispensable to any just conclusion upon the question of expense. Opinions ventured in the absence of such knowledge cannot be regarded as thoughtful estimates, but as mere haphazard conjectures without persuasive force.

III.

THE COMPARISON MADE BY COMPLAINANT'S WITNESSES IS BETWEEN THE EXPENSE OF WAY TRAINS AND THAT OF THROUGH TRAINS; NOT BETWEEN THE EXPENSE OF STATE BUSINESS AND THAT OF INTERSTATE.

The issue tendered by the complainant is that it costs more to handle *State* than *interstate* freight. The evidence offered is *in* support of another and *entirely* different question, to wit, that a *way freight* train is more expensive than a *through freight train*. The record is crowded with—indeed, it is devoted to the recital of details, important and unimportant, substantial and trivial, real and fanciful, nothing within the range of the imagination being omitted, to show that the *way train* is more expensive than the *through train*. This evidence was offered and accepted in the court below as abundantly adequate to prove the issue that it costs, say three times as much to handle State freight as interstate freight.

Hundreds of pages of his kind of evidence were introduced by the complainant as if it were decisive of the issue; just as if the real issue were (as it is not) between "way train" and "through train," instead of being (as it is) between "State freight" and "interstate freight."

The success with which this confusion of issues, with which a studied substitution of an imaginary issue for the real one was attended in the court below, is one of the motives of this appeal; whose purpose it is to correct a finding upon a false issue and a decree based upon that finding.

It is true, that skillful methods of examination were able, from time to time, for a moment to obscure the fact, but the record as a whole shows clearly and unmistakably

that the dominant thought always first and foremost in the minds of the witnesses, and which they expressed over and over again, was the relative expense of the *way freight train* and the *through freight train*, and *not* that of State and interstate freight. For proof of the truth of this assertion, we appeal with unhesitating confidence to the record itself.

EVIDENCE OF HOWARD ELLIOTT, PRESIDENT NORTHERN PACIFIC.

Mr. Elliott said (Record, Vol. I, p. 427):

> "Q. Has your service with the company enabled you to observe the relative cost of doing *local* and *through* business on the Burlington road in Missouri?
>
> A. Yes.
>
> Q. Is there, in your opinion, any difference in the cost of handling *local* freight and the cost of handling *through* freight?
>
> A. Yes.
>
> Q. What, in your opinion, is the relative cost or expense of handling the two businesses?
>
> A. I think it is rather difficult to say exactly. I should say anywhere from three to six or seven times greater for *local* business as compared with *through*, depending on the class of the branch and the amount of business on the branch."

And then the witness proceeds, in response to an inquiry (p. 427), as to the elements "which enter into the extra cost of doing *local* business," says: "Another element is the fact that the so-called *'local'* or *'way train'* cannot be loaded to its full capacity * * * whereas, on the *through* business you get the maximum efficiency of your engine and train crew every time you move them." (p. 428.)

Upon cross-examination, he said (pp. 430-1):

"Q. Judge Spencer asked you if you were familiar with, or if your services had enabled you to express an opinion as to the comparative expense between doing *local* and *through* freight business?

A. Yes, sir.

Q. You so understood the question?

A. Yes, sir.

Q. What do you mean by "local" freight business, Mr. Elliott?

A. I should call *local* business business that was picked up at a place like Hannibal and *peddled out from one station to another* in the State of Missouri, *or move on to a branch line.*

Q. Would you by that same term, and in your understanding of the question and the giving of the answer, also include such freight, for instance, as was taken from Des Moines, Iowa, and sent down on a branch line to Albany, Missouri?

A. Yes, sir; I should call that *local business.*

Q. Or such freight as was taken from Indianola, Iowa, and sent down to any point on either of those branches with which that connects. That would be *local business* according to your idea?

A. That would be my interpretation of it.

Q. And by *"through"* business you would mean business that was handled in what are known as *"through freight trains?"*

A. *Substantially that.*

Q. That is, by "through business" you would refer to shipments that would originate, say at Kansas City and end at Hannibal?

A. It might be going to New York.

* * * * * * * * * *

Q. You will call business originating in Kansas City and ending at Hannibal or St. Louis, *carried on a through freight train*, "through freight business?"

A. Yes, sir.

Q. *And your testimony was given upon a comparison of the expense of handling the two classes of business that you have indicated you meant, in answer to my question?*

A. *Yes, sir.*"

And again (p. 439):

"Q. Your answer, as I took it down—and I tried to take it down exactly—was that the additional expense for handling *local* as compared with *through* business was from *three to six times as much?*

A. Yes, sir.

Q. That you have already explained was a comparison of *local* freight business with *through* freight business.

A. Yes, sir.

Q. Do you mean by the expense of handling a *ton of freight per mile in your local freight business, was three to six times as much as the expense of handling a ton of freight per mile in the through freight business?*

A. In a general way, yes."

And the fact that all the comparisons of expense which the witness had made were meant by him as comparisons between *local* or *way trains* on one hand, and *through* trains on the other, is emphasized and placed beyond dispute by his further testimony (p. 459):

"Q. Are you using *"through"* and *"local"* freight in the same sense that I have described them?

A. I don't know if we do or not. As I understood the objection that the counsel of the railroad interposed, they understood "local" freight to mean freight moved in Missouri.

Q. I am asking you about local freight without reference to whether it originates or ends in the State, and I understand you have been giving it the same meaning?

A. I am frank to say that I consider it local, even if it crosses the State line.

Q. There is no misunderstanding between us. *Local freight* is what is handled on *local freight trains*. And *through freight* is what is handled by *through freight trains, in your testimony?*

A. *Yes.*"

EVIDENCE OF H. G. CLARK, DIVISION SUPERINTENDENT MISSOURI PACIFIC.

Mr. Clark offered his opinion upon the question of extra cost, and gave the reasons for his opinion, all of which pertained to the *way freight train* service and its incidents. His testimony upon these points has already been quoted from.

He then testified (Record, Vol. II, p. 1635):

Q. Before you pass from the item of cost by reason of the expensiveness of what you term the *way freight* trains, I understand that by that you mean that because *State freight* is carried in that kind of a train, therefore it would cost the company four or five times as much to do the State freight business as to do the interstate business?

Mr. Hagerman: That is not a fair assumption. Those are some of the reasons. You have not permitted him to tell all the reasons.

Mr. Kennish:

Q. Isn't that the reason, so far as the extra cost of the train in which the freight is carried is concerned?

A. *I am comparing the cost of the way freight train with the through freight train.*

Q. You assume that the *State* business, of course, is done on the *way freight trains?*

A. On the Missouri Pacific we have four classes of freight trains.

Q. Is that right? Were you using *way freight trains* as the trains upon which the State business was carried, and, therefore, the State business cost the company that much more *by reason of that fact?*

A. *Yes, sir.*

And again (p. 1637):

Q. You were speaking of *through* business as contrasted with the business done on the *way freight* trains, weren't you?

A. *Yes, sir.*

Q. You were dividing freight into those two general classes?

A. Yes, sir.

Q. *Through* business and that which is done on the *way freight trains?*

A. *Yes, sir.*

Q. And you give the reason why the business done on the *way freight* train would be *more expensive* to the company than that done on the *through freight* trains?

A. Yes, sir.

Q. *You speak then of State freight, of course, as being done on the way freight trains?*

A. *Yes, sir.*

Q. *And the through freight as being interstate freight?*

A. *Yes, sir.*

Q. Those are the two classes into which you would divide all the freight business done by the Missouri Pacific Railroad in the State of Missouri, and you say that the freight that is carried on the *way freight train* costs the company about four to five times more than the freight which is carried on the *through freight trains?*

A. *Yes, sir.*

And again (p. 1641):

"Q. Your opinion upon which you based the extra cost of the State freight as four to five times than what interstate freight cost, was *applicable to way freight trains entirely, as compared with through trains,* and assuming that the way train carried State freight and the through trains carried interstate freight?

A. *Yes, sir;* because if we had no State freight we would not have any way trains."

And again, on re-direct examination, he said (p. 1644):

Mr. Hagerman:

"Q. I presume there is some particular class of freight that costs ten times as much to handle as some other kinds. But the point I am getting at is, your estimate of four to five times, taking everything into consideration, is it applicable to the State freight as distinguished from the interstate?

A. I don't know that I understand you.

Q. Mr. Kennish asked you—

Mr. Kennish: I suggest that counsel let the witness state for himself.

The Master: The examination is quite leading.

Mr. Hagerman:

Q. My question originally was, how much more it costs to do the State freight business, as distinguished from the interstate: And you said four or five times more?

A. Yes, sir.

Q. Now, Mr. Kennish construes your meaning to be that you only meant it cost four or five times more to do the *way business* than the *through business* between these divisional points?

A. *Yes, sir; that is correct.*

Q. *Which is it you mean?*

A. The way business. It costs four or five times—I am making a safe figure for myself, though I can sit down and figure, as poor a figurer as I am, that it costs four or five times as much to handle this way business within the State than it does both classes of through business, interstate.

EVIDENCE OF HENRY MILLER, GENERAL MANAGER WABASH RAILROAD.

The fact that the witnesses, when they give opinions as to relative expense, have constantly in their minds the difference between the expense of way and of through trains, and that it is an opinion upon *that* difference which they really intend to express, is illustrated by the testimony of Henry Miller, General Manager of the Wabash Railroad Company. He had, until a comparatively short period before giving his testimony, been connected with the complainant's system in Missouri nearly all his life. (Record, Vol. III, pp. 2826-7.)

He also said that the extra cost was practically the same on the Wabash, the Missouri Pacific and the Burlington (the complainant) (p. 2831).

Mr. Miller, in his testimony already referred to, had said, in answer to a question by counsel for the Wabash Company, that "the business of Missouri would cost, to handle it, two or three times as much as the interstate or *through* business, as it is handled on the railroad." (Record Vol. III, p. 2829.) And then, being asked to "indicate the foundation of your opinion," he at once proceeds to specify the respects in which a "way train" is the most expensive, and among other things remarks (p. 2829): "I should say, by way of comparison, that a *local* train might average 100 tons where a *through* train would average 300 tons." He says "the *way freight* uses more time. They are usually scheduled at about half the rate of speed the *through freights* are." "It is necessary to have more frequent water stations, about twice as many, for the *local* trains as for the *through* trains."

Some parts of Mr. Miller's testimony seem inconsistent with others, but that in his mind the dividing line was between *way* and *through trains*, is apparent (p. 2854, Record).

> Q. Then by 'through or interstate business' those terms are synonymous, are they. You do not include in through business any business that originates and ends in the State of Missouri, at all?
>
> A. *Yes, sir; it is handled in the through train.*
>
> Q. When you say that the business in Missouri costs two or three times as much to handle as interstate or through business, by the expression 'through business' you do not include any business which originates and ends in Missouri, do you?
>
> A. *Yes, sir.*
>
> Q. You do?

A. Yes, sir. *I include that car you just specified, St. Louis to Kansas City.*"

And again Mr. Miller says (pp. 2850-2):

A. Yes, sir; but as a rule the through train has a full train of through freight. It does not occur very often that that train would set out a great many cars at Moberly.

Q. Do you mean by the *through train, a train that is loaded to its capacity with through carloads from Chicago to Kansas City?*

A. *Yes.*

Q. That is what you mean.

A. Yes, sir; and the train is run because there is sufficient traffic to warrant its being run over it.

Q. A through train, as you have meant to express it here, means a train running from Chicago to Kansas City with an engine loaded to its full capacity, with full carloads of freight, all of it to go all the way to Kansas City from Chicago?

A. Full carloads—we have carloads and L. C. L. We have cars full and less than carload business.

Q. That is what I mean. The cars themselves would be full?

A. Yes, sir.

Q. The through train then has the same constituent or the same elements when it reaches Kansas City that it had when it left Chicago?

A. Yes, sir.

Q. There has not been any dropping out or taking on?

A. No, sir.

Q. *That is what you mean by a through train, is it?*

A. Yes, sir.

Q. Mr. Miller, when you speak of one kind of business costing two or three times as much to handle as another kind of business, you mean, I take it, that it costs two or three times as much *per ton mile?*

A. Yes, sir.

Q. You spoke this morning of a train which would be loaded at Chicago and go through to Kansas City intact, with the same freight unimpaired, or not enlarged or increased at Kansas City, that it had at Chicago; and you spoke of that as a through train. Now, *is it business on a train of that kind which costs one-half or one-third as much to handle as the State business?*

A. *Yes, sir.*

Q. It is business carried in a *train of that kind* constituted in that way, *which you mean when you speak of through business?*

A. *Yes, sir.*

Q. There is one train, from Chicago to Kansas City, I suppose the same would be true of a like train from Kansas City to Chicago. That would be on the same principle?

A. Yes, sir.

Q. Both of those trains go clear across the State, that is true?

A. Yes, sir.

And again, in giving the reasons for his opinion that the cost of through business on a train from Buffalo or Chicago to Kansas City would be only one-third or one-half that of the State business, and he immediately proceeds to enumer-

ate the particulars in which the *way freight train* is more expensive, because it is those things, and those things only, which influence him to his opinion. He has no other reasons. In his mind, ever present, the two opposing factors are the *way train* and the *through train* (pp. 2860-1).

"Q. You said that, in your opinion, the State business in Missouri would cost two or three times as much to handle as the *through business, on this Buffalo and Chicago train*, that you mentioned a while ago, those six trains. Can you offer any evidence in support of that opinion?

A. Only the instance I cited yesterday that these trains that do the State business carry a very light tonnage, comparatively.

Q. I am asking you if you can offer any evidence.

A. No, sir. My statement was based on experience, you cannot state in any particular, constituting any one of the particulars which constitute the whole work of doing the business, you cannot state approximately how much more in that particular it costs per ton mile than it does to do this through business, between Chicago and Buffalo on the one hand, and Kansas City on the other hand?

Q. You said two or three times. Then it would be eight or twelve mills?

A. Yes, sir.

Q. That is the result of it. But can you produce any figures or the result of any tests to justify your opinion?

A. No figures. It is one of these things that a man learns by experience, and you cannot rub out the experience.

Q. *Will you give your reasons for the extra*

expense; of what does the extra expense consist?

A. The first item is wages.

Q. Wages of what?

A. Everybody connected with the handling of the freight.

Q. I would like to be as definite as I can, that is pretty broad.

A. Train men, engine men, station men; and in the maintenance.

Q. Maintenance of what?

A. Maintenance of the equipment and of the road. Because you have to maintain for these *local trains* the same main track and passing tracks that you maintain for the *through trains*.

Q. What is that, Mr. Miller?

A. You have to maintain for the *local trains* all the things you have to maintain for the *through trains*, and in addition you have the sidings for *local business*, including elevated tracks, stockyards, warehouse facilities, and the labor cost.

Q. What do you mean by 'labor cost?'

A. Whatever freight handling you have, and clerical force.

Q. Aren't your freight handlers included in your station men?

A. Yes, sir.

Q. That is included?

A. Yes, sir.

Q. What else?

A. A locomotive is practically used *on a local train* going over one division, twenty-four hours. On the *through trains* that same engine can easily make a round trip. The *local train* hauls about one-third of the capacity of the engine, and the *through*

train, as a rule, is loaded to the full capacity. The *local trains* having to do the switching, loading and unloading of freight at stations, make a great deal of overtime, something which seldom occurs to a *through train*. One hour's overtime on a train means an increase of ten per cent. in wages. It is not infrequent that they get in two, three or four hours overtime on those trains. In picking up stock, the shipper sometimes has not his shipment at the station, it is on the way, or he has just arrived, and the train has to wait. All those things get into the cost. It is necessary to maintain more water stations for the trains *doing local work* than it is for the through trains. The *local trains use more coal*, too. And supplies of every kind. The *local business* is re-handled more or less; at unimportant stations less than carload business in the warehouse and carload business in the yard; all of which adds to the cost."

EVIDENCE OF W. T. TYLER, DISTRICT SUPRINTEDENT ST. LOUIS & S. F. R. R. CO.

Mr. Tyler had testified that the cost was three to five times as much. (Record, Vol. IV, p. 4101.)

But on his cross-examination he testified explicitly, in language that can have no other meaning, that his comparison was really between the expense incident, respectively, to *way* and *through trains*. (Record, Vol. IV, p. 4138):

"Q. When you come right down to what we might call 'scientific accuracy,' *you really don't mean the relative cost between State and interstate at all*, but you really mean the *difference between through and local?*

A. *Yes.* The interstate feature does not interfere with it. *It is 'through' or 'local' wholly.*

Q. And you rely on what you assume with respect to the through and local and State and interstate very largely because you assume that the through is mostly interstate, and that the local is mostly State?

A. That is the idea, yes.

Q. And while there is not an exact identity between them there is perhaps a substantial identity?

A. Yes.

Q. But strictly speaking, you *make your differentiation between through and local?*

A. Yes, between through and local freight and with reference to long and short hauls.

Q. That again comes to through and local very largely?

A. Yes.

Q. And all your statistics that you have and then the special observations you make *have reference to through and local rather than to State and interstate?*

A. *Yes.*"

EVIDENCE OF CHARLES STURGIS, AUDITOR OF BURLINGTON.

Mr. Sturgis answered upon that subject, as follows:

Q. Including those and all other expenses that you know of, what, in your judgment, would be the relative cost of *local business* as compared with *through business?*

A. *From three to seven times.*

EVIDENCE OF J. G. RAWN, GENERAL MANAGER ILLINOIS CENTRAL RAILROAD COMPANY.

Mr. Rawn said (Record, Vol. 1, p. 568):

"A. In my experience and the basis upon which we predicate our cost of operation, the cost of handling *local freight*, as we term it, in comparison with that which we term *through freight*, and in accordance with our statistics in the matter, we find that the direct train cost for exclusive train operation, which I shall endeavor to deal with as one item, and with other items separately—*the direct exclusive train cost*, of that which we term *local freight*, is about *three and a half* times that of handling *through freight*. That is, I reiterate, what we term exclusive train cost, or direct train cost."

Mr. Rawn declined to express any opinion as to the relative expense of handling State and interstate freight.

IV.

A COMPARISON OF THE WAY TRAIN WITH THE THROUGH TRAIN DISCLOSES THAT THE FREIGHT IN THE WAY TRAIN IS OVER 65 PER CENT INTERSTATE AND LESS THAN 35 PER CENT INTRASTATE; AND THE FREIGHT ON THE THROUGH TRAIN IS 85 PER CENT INTERSTATE AND 15 PER CENT INTRASTATE.

As the finding of the court relative to the division of expenses between State and interstate freight was necessarily based on the assumption that the *way train* was three to eight times as expensive as the *through train*, and that the *way train* simply hauled *State freight* and the *through train interstate freight*, and that, therefore, the State freight account should be charged with *three times* the amount of expense per ton charged to interstate freight.

It so happens that during the trial of the cases actual tests were made upon a number of occasions as to the way freights and through freights, both by the railroads and the State. The result of these *actual tests* completely overthrows the finding of the court and its action in charging State freight with three times the cost per ton charged to interstate. The actual test discloses that about *two-thirds* of all the freight in *way trains* is *interstate* and one-third intrastate. That about 85 per cent of all the freight in through trains is interstate and 15 per cent is *intrastate*. So we find, that the *interstate* freight is carried in this *costly way train*, and that State freight is carried in that cheap through train. Preliminary to an examination of the actual tests we will see how the through freight train and the way freight train operate.

HOW THROUGH AND WAY FREIGHT TRAINS OPERATE AND THE CLASSES OF FREIGHT CARRIED BY EACH.

The *through* freight trains, pass over a complete division of the road, and the *way freight* trains operate between division points. (Record, Vol. I, p. 497.)

The division points upon complainant's main line of railroad in Missouri, are at St. Louis and Hannibal, on the Mississippi river; Brookfield and Cameron, in the interior; and Kansas City and St. Joseph, on the Missouri river. (Vice-President Willard's testimony, Record, Vol. I, p. 498.)

Interstate freight originating between division points in Missouri, is hauled by the *way train* to the nearest division point. (Willard's testimony, Record, Vol. I, p. 505.)

Interstate freight originating out of Missouri and destined to stations in Missouri between division points, is hauled on a *through train* to the nearest division point, and there it is put into a *way train* for distribution and delivery at its places of destination. (Willard's testimony, Record, Vol. I, pp. 505-6.)

Bethard's testimony, Record, Vol. II, p. 1830.

Testimony of Mr. Miller, General Manager of the Wabash Railway. (Record, Vol. III, pp. 2847-50, 2853-4, 2856.)

So not only is interstate freight thus handled on the *costly way train;* it is also the fact that *State freight is hauled on the cheap through train.*

State freight, loaded at a division point whose destination is beyond the next division point, is placed in a *through* train and hauled as far as the next division point in that train; its immediate neighbor in the train may be a carload of interstate freight from Boston, having the same destination. Those two cars will, in the same manner, leave the through train at the division point, there to take their place in the *way train*, and proceed, in that *way train*, to the station of their

destination, where they will be placed upon the same unloading tracks, perhaps still joined together by their original coupling. The treatment accorded to those two shipments, both in the *through train* and in the *way train*, and the expense incident to that treatment, are precisely the same. (Willard's testimony, Record, Vol. I, p. 506; Bethard's testimony, Record, Vol. II, p. 1828; Miller's testimony, Record, Vol. III, pp. 2848, 2855-8; Smith's testimony, Record, Vol. II, p. 1516; Doddridge's testimony, pp. 1611-12, 1615-16, 1582.)

And less than carload freight of both classes, State and interstate, are found *in the same car*. (Taliaferro's testimony, Record, Vol. I, p. 899.)

That what are called the *expensive way trains haul interstate as well as State freight, and that State freight is transported on through trains*, is not disputed by any witness whose attention is directed to the subject. But this important fact is persistently and studiously kept in the background, and the extra expense of the *way trains* (greatly magnified, as we think) is dwelt upon with much elaboration, and erroneously dealth with as a feature for which the *State traffic is wholly responsible*. Whenever a witness who has expressed an opinion that the handling of State freight costs relatively the most, is required to give the reasons for his opinion, he promptly enters upon a recital of the items of expense incident to the operation of a *way train* and to the maintenance of the facilities necessary, in his opinion, for its use.

A concerted attack has been made by railroad officials upon the way train which is regarded by them as almost an object of contempt. It is a constant trial to them. It is the black sheep of the family, the pariah of the railroad system, its hewer of wood, its drawer of water.

The fly in the ointment of the railroad operator's happiness is the *way train;* the ball and chain at the heel of his successful management, is the *way train;* of all the evils

which beset railway administration, the *way train* is the crying one; and we are asked to believe that the State traffic is, virtually, the sole cause of its being, and that all the calamities flowing from its vexatious existence should therefore be charged to the account of that traffic.

We are to regard the existence of the *way train* as tolerated, only because required by law, and therefore a necessary but disagreeable incident of railroad operation. The great *through train* is the favored one, whose *just burdens* the complainants would, in this litigation, cast upon its more *humble associate*. But if there were no local trains, no local business, there would be no through trains, no through business. The through train never would have been heard of, it would not have been born, it could not live a moment were it not for the way train. Indeed, the way train is the breeding and nursing mother of the through train. The local business is the foundation upon which the vast superstructure of through business rests. It furnishes all its constituent elements. It is the numberless little rills of local traffic, having their sources at the towns and villages and hamlets and cross-roads all over the country, which, gathering together and carrying the products of the farm and the forest, the shop and the mine, converge here and there and create the mighty river of through traffic. They are, in fact, the essential prerequisite to the existence of that river.

It is important, therefore, to ascertain, if possible, whether it be a fact that this undesirable feature of railway operation is maintained and the great expense thereof incurred for the benefit of the State business, as is claimed. If the fact be that it is in part maintained for the benefit of the interstate business, then the entire additional expense ought not to be charged to the State business. If it be a fact that it is maintained largely for the benefit of the interstate business, it follows that the larger share of the much ex-

ploited extra expense should be borne by that business. Obviously it is, in this immediate connection, of much consequence that the trier of fact be informed whether all the freight carried on these way trains was State freight, and if not, and a part of it was interstate freight, how much of each, or the relative proportion of each; informed, not as a matter of opinion or conjecture, *but as a matter of fact*. Obviously also, it was incumbent upon the complainant to produce evidence of that fact. Obviously, also, it was in its power, and practically in its exclusive power, to produce that evidence. But this record will be searched in vain for any testimony adduced by the complainant as to the proportion of State and of interstate freight transported upon its way trains.

But, notwithstanding the silence of this complainant, the Chicago, Burlington and Quincy Railroad Company, upon this point, notwithstanding its apparent confidence that opinions will be accepted as a sufficient substitute for facts, this record does afford convincing evidence, sometimes unwittingly furnished by the associates of the complainant in this litigation, sometimes by actual tests made by the experts for the State, that a very large proportion of the freight carried upon the way trains is *interstate freight*. Some of that evidence will now be referred to.

Mr. W. B. Doddridge was a witness in the case of the Missouri Pacific Railway Company, and also in this case. He had large railroad experience. From 1893 to 1900 he was General Manager of the Missouri Pacific Railway system. (Record, Vol. II, p. 1569). At the time of giving his first evidence (January 16, 1907), he was, however, engaged in other business (p. 1597). He had been an attentive listener to the evidence at nearly all the hearings in these cases before he gave any evidence himself (p. 1597). He was apparently regarded as one of the chief witnesses for the complainants in these cases. Indeed, he was recalled to the wit-

ness stand by the complainants no less than seven times. Mr. Doddridge gave lengthy, interesting and instructive disquisitions upon the subject of railway management, and his testimony threw much light upon some of the questions involved in this controversy.

It is to be gathered from his testimony that in his opinion, if the business of the Missouri Pacific Railway Company could be confined to a dozen through daily trains each way, between St. Louis, Missouri, and Pueblo, Colorado, each train composed of cars loaded with carload freight and as many of them as the engine could haul, stopping only to change engines and train crews, or for water or fuel, whistling in derision through the cities and towns and villages of Missouri and Kansas, on their way, an ideal situation would be realized. In his opinion, all trains but such as these are deplorable, but necessary evils. All other trains increase the expense and reduce the net revenue of the company. And, in his opinion, this increase of expense, this reduction of net revenue, is to be ascribed to these way trains, and, therefore, be necessary corollary, to the freight which has its origin and destination within the boundaries of the State. But the supposed corollary is, in fact, a *non sequitur*, because his own tests show that *much the larger part of the freight carried upon these way trains is interstate freight*. It is true that these tests were made by him and offered in evidence for another purpose, but incidentally they do clearly show this fact.

DODDRIDGE TEST.

In December, 1906, Mr. Doddridge examined the contents of six *way freight trains* on the Missouri Pacific Railroad. (Record, Vol. II, pp. 1589-90.) By far the larger part of the tonnage on these trains was in carload lots, only a little more than 4 per cent of the whole being less than carload freight (pp. 1618, 1621). The carload freight

on these trains was about 96 per cent of the whole, and of the 96 per cent *only* 37 *per cent* was *State* freight, while 63 per cent was *interstate freight* (pp. 1589, 1621). There was 70 *per cent more* interstate than State freight.

He said these six *way trains* carried an average tonnage of 175 tons (pp. 1589, 1621.) If 4 per cent of this (7 tons) be deducted for less than carload freight there remains in the train 168 tons of carload freight; 63 per cent of it, or 105 tons, is *interstate freight*, leaving only 70 tons of State freight, even if all the less than carload freight be treated as State freight.

But this is not all. Mr. McPherson, assistant to the General Manager of the Missouri Pacific Railway Company, testified (Record, Vol. IV, p. 4295), that the average haul of interstate freight on his road in Missouri was 105 miles, and the average haul of State freight was 52 miles. Multiply 63 (the interstate percentage of freight on these way trains) by 105 and we have 6615; multiply 37 (the State per centage) by 52, and we have 1924.

The ton miles of freight hauled by this way train would then be in the proportion of 6615 interstate and 1924 State; the interstate being 3 2-5 as many as the State, and the train therefore performing 3 2-5 times as much service for the interstate as for the State business.

The tabulated statement regarding the six local trains, prepared under the supervision of Mr. Doddridge, was offered as Exhibit 14, and is found in Vol. III, p. 2400. But subsequently a clerical error was discovered in it, which was corrected (Record, Vol. II, p. 1914), and the corrected table is in Vol. III, p. 2401.

Mr. Doddridge had testified from this statement (Record, Vol. II, p. 1589), that of the less than carload freight carried on these trains, only 7 per cent was interstate, and that

93 per cent was State freight. The corrected statement shows that 14 per cent of this class of freight was interstate and 86 per cent State.

And of the total tonnage of these six *way trains*, 59 per cent was interstate and only 41 per cent State freight (Exhibit 14, Record, Vol. III, p. 2401); Ludlam's testimony, Record, Vol. I, p. 1159).

HAMILTON TESTS.

Mr. Hamilton, under the direction of the experts for the State, made certain investigations covering freight trains upon the St. Louis and San Francisco Railroad. The performance of the trains on July 17, 1907, was examined. That date was selected by the superintendent of transportation of the railroad company on the basis of its tonnage and ton milage. (Record, Vol. I, p. 4608.) Mr. Hamilton's testimony, detailing the results of this examination, is found in Vol. IV, pp. 4608-17. His information was obtained from the wheel reports and way-bills of the company.

He ascertained the relative tonnage of State and interstate freight on eight way freight trains running on the Memphis division on that day, four of them being northbound and four southbound.

On the four southbound trains there were:

State carloads, 270 tons.

Interstate carloads, 546 tons.

Less than carload freight, 70 tons.

(Record, Vol. IV, pp. 4614-15.)

The carload *interstate tonnage was twice as great* on these *way trains* as the State carload tonnage (p. 4615).

The less than carload freight was not classified between State and interstate, as it was impracticable (p. 4613).

The total tonnage on these trains was 886 tons, and the less than carload freight was less than 8 per cent of the whole.

The four northbound carried, State carloads, 1,306 tons and 603 tons interstate.

He also investigated 3 *through trains*. The total tonnage was State, 15 per cent; interstate, 85 per cent. (p. 4610, 4613, Record.)

Mr. Hamilton also investigated six *way trains* between St. Louis and Monett, which had run on the same day.

On these the State carload freight was 476 tons.

The interstate carload freight, 471 tons.

Less than carload freight, 216 tons.

(P. 4617.) On these trains the State and interstate carload freight was *about equal*.

He also examined the results of the operation of sixteen through trains between St. Louis and Monett.

The State carload tonnage was 366 tons.

The interstate carload tonnage was 2,639 tons.

Less than carload freight, undivided between State and interstate, 992 tons (p. 4617).

Consolidating these 16 through trains with the other through trains examined and investigated, the result is that 11.6% was State carload freight.

PEABODY TESTS.

Mr. Peabody, the statistician of the Atchison, Topeka and Santa Fe Railroad Company, was a witness on behalf of the complainant. (Record, Vol. IV, p. 4404.) He gave his testimony December 18, 1908.

For the purpose of making some calculations as to the relative cost of State and interstate freight business, he caused two tests to be made on the line of his company in Missouri; one was from November 18 to November 24, 1908, and the other from November 30, to December 6, 1908. His tests covered every freight train, both through and way, running on the line during those periods (p. 4419), 123 through ap-

peared in certain tables prepared by him; one, Exhibit 41 (Record, Vol. V, pp. 4935-6), and the other, Exhibit 42 (Vol. V, pp. 4937-8).

Although the tests were made and the exhibits prepared for quite a different purpose, they incidentally contain valuable information bearing upon the question now under discussion.

From Exhibit 41, which is applicable to his first six-day period, it appears that the *way trains* carried freight, as follows:

State freight, 863 tons; interstate freight, 2,024 tons. On these *way trains*:

The State freight of the whole freight is.... 29%

The interstate freight of the whole freight is.. 71%

The State freight carried on through trains for the same period was 1,905 tons, and the interstate carried was 38,799 tons. Thus, there was more than twice as much *State* freight (1,905 tons), carried on the *cheap through trains* than was carried on the *expensive way trains* (863 tons).

Mr. Peabody's Exhibit 42, covering the second six days period, showed that the way trains carried, in tons:

State freight, 892 tons, and interstate freight 2,039 tons.

The *State* freight was only 30.4 *per cent* and the *interstate* freight was 69.6 *per cent*.

The *State* freight carried on *through* trains for the same period was 1,511 tons, and *interstate* 29,202 tons. Nearly twice as much *State* freight (1,571 tons), was carried on the *cheap through trains* as was carried on the *expensive way trains* (892 tons).

Combining the results of the two Peabody periods we have the following:

(1)

Through trains carried in tons, State freight.. 4.8%

Through trains carried in tons, interstate freight 95.2%

(2)

Way trains carried in tons, State freight..... 30.2%
Way trains carried in tons, interstate freight... 69.8%

Of the *entire State freight* carried during these test periods only 34 *per cent* of it was carried by *way trains*, while 66 *per cent* of it was carried by *through trains*.

From these tests and actual facts, we have the following indisputable results:

1. That the greater part of the freight carried on the *costly way train* is *interstate freight* (From 50 to 65 per cent).

2. That the greater part, by far, of the *total* volume of *State* freight is carried on the *cheap through trains*. (About twice as much).

By the facts do we condemn the finding of the court. By the evidence of the road's officers, who were *long* on opinions and short on facts and information, do we show that the greater part of the freight on the way train is interstate and not State freight, and the greater expense is chargeable to interstate expense and not State.

Again, every pound of *interstate* freight received at or shipped from the towns and stations on the branch lines is transported on the *way train*, because on these branch lines there is no through train. The cattle and hogs, the grain and other products of the fertile territory whose first market is at one of these towns or stations, and from them are shipped to Chicago or other large markets outside the State, find their way to the main line of the railroad and to the great through trains only by means of the *way train*. (Doddridge's testimony, Record, Vol. II, pp. 1581, 1615).

On all such lines the *entire interstate* freight is carried by this costly way freight, because there are no through trains run on them. (pp. 499, 1962, Record).

CONCLUSION.

In the final analysis we find the *greater part* of the *State* freight is carried in the *cheap through trains,* and that the *greater* part of the freight carried by the *costly way freight is interstate.* So we must charge interstate commerce with the greater part of the expense of operating the way freight, in fact it must be charged with two-thirds of the expense chargeable to the way freight.

We find, also, that the greater part of the entire volume of State freight is carried by the cheap through trains. Actual conditions are just the reverse of those found by the court, and just the reverse of what the complainants' witnesses wished or expected. The court, therefore, has made the State freight traffic bear an expense chargeable to interstate traffic.

The interstate freight has attempted to beat its way, hobo fashion, in the way trains, and have the State freight account bear the expense. Not satisfied with that, it even attempts to have the State freight account bear three times over an expense chargeable only to interstate freight. It has not only sought to be carried free, but to, at the same time, gather the revenue from the transit and place same in the net earnings account of interstate traffic, thus cutting two ways by compelling the State freight to carry it free and, at the same time, robbing the State freight account of the revenue for the transit.

It is also true that it costs more (pp. 872, 898-9 and 3022, Record) to handle *interstate* less than carload freight than it does *State* less than carload freight. The complainant falls before this array of facts, figures and evidence.

IV.

TOTAL EXPENSES SHOULD NOT HAVE BEEN DIVIDED BETWEEN STATE AND INTERSTATE TRAFFIC UPON THE BASIS OF GROSS EARNINGS. AS TO FREIGHT TRAFFIC IT SHOULD HAVE BEEN DIVIDED ON THE TON MILE BASIS AND AS TO PASSENGER TRAFFIC ON THE PASSENGER MILES AND SERVICE RENDERED.

A.

The paramount question is, how should the expenses of doing State and interstate business be divided? How much of the expense is to be apportioned to intrastate traffic, and how much is to be apportioned to interstate traffic? The complainant did not keep the costs or expense of handling State traffic separate from interstate traffic, and has left it to guess or hazard as to how the expense should be divided. It has failed to make a full disclosure and tell the Court, and has utterly failed to make any proof of probative force as to the expense assignable to each class of traffic.

The average revenue received by complainant per ton per mile for State freight traffic is more than twice as large as the average revenue received upon interstate freight traffic per ton per mile (p. 1414, Printed Record). The State contends and it is the correct position that the expense for handling the freight traffic should be divided according to the cost per ton per mile to move it, and the expenses of the passenger traffic must be divided upon the two factors of passenger miles and service rendered. The cost per ton per mile is ascertained in each class of freight entirely irrespective and regardless of the revenue derived from the service. To reach that cost as nearly as possible was the effort and aim of the experts for the State.

TON MILE THEORY.

To divide expenses on the ton mile theory you multiply the number of tons by the number of miles moved, which gives you the total number of ton miles. You do this as to both the intrastate freight and interstate freight separately. You divide your total freight revenue by your total number of ton miles and you thus get the revenue per ton mile. You then divide your total expenses by your total number of ton miles and you get your cost per ton mile. Knowing the number of intrastate ton miles and interstate ton miles you get the cost or expense for handling each class by multiplying the number of ton miles in that class by the expense per ton mile.

It is easily illustrated in the following assumed case. Say the Burlington railroad hauls one hundred tons of intrastate freight ten miles and also hauls two hundred tons of interstate freight ten miles with no terminal charges, etc. Say the revenue received for both hauls is $300.00, and the expenses for both hauls is $210.00. The expenses would then be for hauling the State freight $70.00 and for the interstate freight $140.00. This result is obtained as follows:

One hundred tons intrastate freight moved 10 miles gives	1,000 ton miles
Two hundred tons interstate freight moved 10 miles gives	2,000 ton miles
Total ton miles	3,000

Revenue received for moving both State and interstate freight	$300.00
Expenses for moving both State and interstate freight	210.00

Revenue per ton mile is (divide $300 by 3,000)	.10
Expense per ton mile is (divide $210 by 3,000)	.07
Net profit per ton mile is	.03
Expense assignable for moving State freight is multiply 1,000 by .07)	$70.00
Expense assignable for moving interstate freight is (multiply 2,000 by .07)	140.00
Total expense	$210.00
Net profit on moving State freight is (multiply 1,000 by .03)	$30.00
Net profit on moving interstate freight is (multiply 2,000 by .03)	60.00
Total net profit	$90.00
Total expense for moving both classes	$210.00
Net profit for moving both classes	90.00
Total	$300.00

The State and its witnesses wholly rejected the "gross revenue theory" adopted by the trial court and affirmed that the ton mile theory was the only test which took into consideration the actual facts and every element of cost. This theory takes into consideration all the facts, the amount hauled, the weight and the distance moved, etc. It is the unit which is the same in all cases. A unit for every comparison. It takes into consideration every element, no matter whether waste space, length of haul or empty cars. It is used by all railroads and is the one unit which will apply

with equal justice to every class of freight. It has been recognized, not only by the railroads themselves, but by the courts, and is the one which meets with justice and with reason. The State's witnesses declared it to be the only basis for the division of expenses, and the railroad's witnesses and officers in this case in most instances were forced to acknowledge it.

The expert witnesses upon behalf of the State were Charles Ludlam, A. P. Taliaferro and P. A. Hamilton, men of integrity and known ability. They were and had been long connected with the well known firm of Haskins & Sells, chartered accountants of the city of New York, with offices in other important cities. Each of them had enjoyed practical experience in the operation of railroads. Mr. Ludlam and Mr. Taliaferro had the advantage of a very large personal experience in the methods pursued by railroad companies in the keeping of their accounts, resulting from their regular examination and audit of the accounts of some of the most extensive railroad systems in the country. Their time and that of their assistants was occupied for months in the investigation of the accounts of the railroad companies parties to the litigation and of their method of handling business. They made the situation the subject of prolonged, serious and intelligent study. Facts testified to by them were the result of actual investigation. Opinions offered by them were based upon these facts and upon their knowledge of railroad operation gained by previous experience and close observation of the general methods and the details of railroad management pursued by the leading railroads of the country and as discovered by them in their examination of the accounts of those companies. This was besides their information obtained by employment in this case, and their examinations made in this case.

The qualifications of Mr. Ludlam for this work are

stated in printed record, pages 852-6 and 939-41 and 852-7 and 2210-12 and 3034-8.

The qualifications of Mr. Taliaferro are stated in printed record, pages 880-90 and 2188-90 and 2203-5 and 2950-3.

The qualifications of Mr. Hamilton are stated at pages 1064-7 and 2168-70, printed record.

It is not too much to say that considering their qualifications, their fitness for the work, the knowledge of actual facts acquired by them; considering their testimony in this case, not only as respects its substance, but the intelligence, fairness and candor with which it was given, the opinions of Mr. Ludlam and Mr. Taliaferro upon this important question are entitled to the gravest consideration.

They presented their views in respect to this important question, giving the reasons why, in their opinion, the expenses should not be divided upon the basis of the gross revenue and also the reasons why, in their opinion, the only correct method of ascertaining the expenses of the State freight business was to determine as nearly as possible the cost per ton mile of handling such business.

Their evidence and logic and reason and the facts upon which they are based are so convincing and so conclusively settle the fact that we take some extracts from their evidence and as given in their own language.

STATE'S WITNESSES.

Mr. Charles S. Ludlam testified (Record, Vol. I, 1160-1):

"Q. Mr. Ludlam, I will get you to state, from your experience, both your connection with railroads and railroad accounts, and your experience as an accountant and auditor of accounts, including your experience in the examination of the books and papers of the Wabash and the Missouri Pacific railroads for the purposes of this litigation.

What unit, in you judgment, affords the closest approach to accuracy, as to either cost or revenue in the handling of freight?

A. In my judgment the best unit known, and I think it is *generally so recognized among railroad men, is the per ton per mile unit.*

Q. Some of your exhibits here, at least some of them, are based upon the ton mile, both as to cost and earnings as the unit. Is that the reason you have taken that as the basis of a number of these computations, that you regard it as the best attainable basis to work on in ascertaining cost and revenue?

A. Yes, sir.

Q. Do you know, from your experience and associations with railroad managers and railroad accountants, and your auditing of railroad accounts, the accounts of other railroads, whether that is a recognized and approved unit in railroad circles?

A. *That is the generally recognized unit, yes, sir.*"

On pages 1170-2, printed record, he said:

"A. I would like to make that very clear—and I do not think I can make it too clear—*that the revenue has no possible relation to the cost.* It costs the company just as much to haul a ton of sugar a mile in Missouri, whether that sugar originates in St. Louis or whether it originates in New York. And the revenue in Missouri is twice as much for hauling it that mile as the revenue on the sugar that originates in New York that is hauled one mile in Missouri. But the cost of actually hauling that ton of sugar a mile is the same in both

cases. And the mere fact that the revenue is twice as much in one case as it is in the other case does not in any way affect the cost per ton.

Q. *That is to say, in ascertaining the cost, the question of revenue should not enter into it, in your judgment?*

A. *Absolutely not.*

Q. The cost has nothing to do with the revenue.

A. They are two separate and distinct factors. Cost has no more relation to revenue than any two things that are entirely separate and distinct.

Q. So if it actually costs, on any theory you figure it out, three times as much to do the State business as to do the interstate business, it should not be considered so far as it affects the question of revenue?

A. The revenue may be ten times as much, but they have no relation to each other.

Q. *The cost must be determined as something separate and distinct and apart from the revenue?*

A. Unquestionably. I would like to illustrate that by a little example I have here.

If you take two tons of freight, each one moving a mile, and one of those tons is State freight, and, for the purpose of illustration we will assume it earned ten cents for moving that mile. The other ton is a ton of interstate freight, which was moved one mile, and we will assume that it earned five cents for moving that mile. That would make your total earnings fifteen cents. The expense, we will assume, for hauling those two tons one mile, both tons of freight being of the same class, would cost identically the same, say ten cents. If you take

that expense of ten cents, however, and divide it on the basis of revenue, you would apportion two-thirds of the total expense against your ton of State freight, or six and two-thirds cents, because the State freight earned two-thirds of the total revenue of fifteen cents. And if the total expense was ten cents, and you apportioned it on the basis of revenue, you would apportion two-thirds of the expense to the State business, which would make the expense for hauling that ton of State freight six and two-thirds cents, as compared with the expense of hauling that ton of interstate freight, three and one-third cents.

Now, there you get a condition right away where it costs you twice as much to move that ton of State freight a mile as it costs you to move a ton of interstate freight a mile, although they both moved under exactly the same conditions, possibly in the same car, and over the same track.

That is the result of apportioning it on the basis of revenue.

Now, if you take it on the three-times basis; that is, three times in proportion to revenue, the State freight earnings being ten cents and the interstate earnings five cents, you would multiply your State earnings by three, which would give you thirty for the State as against five for the interstate. That worked out to a conclusion would result in that ton of State freight costing you 8 4/7 cents for moving it a mile, as compared with a cost of 1 3/7 cents for moving another ton of exactly the same kind of freight, perhaps in the same car, a mile. The expense in the case fo the State freight, 8 4/7 cents, would be exactly six times the

expense of the interstate, which figures out 1 3/7 cents.

Now, then, if you go still further and assume it costs six times in proportion to revenue, the State revenue being still ten cents, multiplying that by six gives you sixty. The interstate revenue remains the same, five cents. If you apportion your expenses on that basis, the total expense of moving those two tons one mile each, ten cents, you would have to apportion 12/13 to that ton of State; or, worked out, the ton of State freight would cost 9 3/13 cents for hauling it a mile, as compared with a ton of interstate freight, costing 10/13 cents for hauling it a mile; although it may move in the same car, and is the same class of freight, and moves over the same track.

In that case, where you say the expense is six times in proportion to revenue, you are apportioning to the State expenses twelve-thirteenths of the total cost of moving those two tons one mile.

And that is not an exaggerated case, because I start out with a revenue of ten cents for the ton mile of State freight as compared with a revenue of five cents for a ton mile of interstate freight. That would make the State revenue just twice the interstate revenue. Exhibit 19 shows that taking all the State freight into consideration, and all the interstate freight into consideration, the company received more than twice as much per ton per mile for the State freight as it did for the interstate freight.

Mr. Ladd:

Q. Assuming that the revenue for performing certain services for State freight is twice as much

as the revenue for performing the same service in the case of interstate freight, *what does it mean to say that the cost of handling State freight is seven times as much as the cost of handling interstate freight in proportion to revenue.*

A. *It means that you are assuming that the cost of moving the State freight is fourteen times as much per ton per mile as for moving the interstate freight.*

And the point I would like to illustrate is, that where the service is the same, *there can be no difference in the cost.* The point of origin of the freight can have no effect on the cost as I see it, although where the service is the same the revenue is not the same, by any means.

Q. Take a carload of salt, and a carload of sugar, both in barrels, ordinarily, which would bear the higher rate for transportation?

A. The sugar would run from double to more than double as much as the salt, for the same distance, and the same weight.

Q. Suppose it is twice as much, and there is the same weight in the car, and that it is in barrels, and although both carloads are shipped from St. Louis to Jefferson City, and go into the same train —is that an illustration of the proposition that the revenue received has no relation to the cost of the services?

A. Yes, sir.

Q. The company would get twice as much for hauling that carload of sugar as it would for hauling that carload of salt?

A. Yes, sir.

Q. And the expense is exactly the same in both cases?

A. Yes, sir. I would like to say, before I get away from that—I should like to qualify that by saying that when I say the expenses are exactly the same, I mean that the only possible difference in the cost is the liability which the company assumes for the value of the two shipments, the sugar being more valuable than the salt. But the total loss and damage paid by the company are such a very small per cent of their gross earnings that when you come to consider the cost per ton per mile, it almost vanishes."

On pages 1186-7 of record he said:

"Q. The ideal way, Mr. Ludlam, if it were practicable, or if the railroads kept their accounts that way, with this lawsuit in view, would be to keep track of each car, so as to have the kind of commodity and the vacant or unused space in the car, wouldn't it?

A. Yes, sir.

Q. That would be the ideal way?

A. Yes, sir.

Q. And without that we have all this system of averages and theorizing?

A. Now right there I would like to say that the same ratio of difference, however, must exist in each class of commodities that is shown by the total of all the commodities in each class. That is to say, that if the less than car load State averages twice as much per ton per mile, there must be a preponderance of the articles that are carried in less than carload business, both State and interstate, that average higher proportionately in the

State business than they average in the interstate business.

Q. In the final analysis, what we get down to, when you figure it your way, it is a system of averages, depending largely upon theoretical calculations, isn't it?

A. *It is reducing the business to a common unit, upon an absolute tabulation of the transactions of the company. It is not theorizing in any sense. It is getting just as far away from that as possible.*

Q. It is calculating upon a system of averages without taking the actual facts into consideration?

A. *It takes all the actual facts into consideration. The amount hauled, the weight, the distance hauled, and so forth.*"

On page 1189 of the record he said:

"Q. You stated repeatedly during your examination that the question of *revenue does not enter into this thing at all?*

A. *Absolutely not at all, into the question of cost; it has not the slightest relation to it.*

Q. The cost should be ascertained in the best way possible?

A. Yes, sir.

Q. The ton mile is not the question; the revenue is not the question; the thing to be desired would be to ascertain the actual cost, if you could ascertain it in any way?

A. *In our judgment, the ton mile basis is the only way in which you could ascertain it.*"

On page 1197, printed record, he said:

"Q. What I want to know is, whether in the light of your experience you would undertake for one moment to say that upon the money invested in the property, more money is made upon the State business, or the short haul business, than there is upon the long haul business?

A. I will answer that by saying that in my judgment, after a very careful study of the situation, the Missouri Pacific railroad made more actual net revenue out of the one and a half million dollars of State freight business than they did in the year 1904, and the same amount in the year 1905, than they did out of the four million and odd dollars of interstate business.

Q. That is regardless of how you ascertain it?

A. Yes, sir.

Q. Regardless of 'per ton mile?'

A. It is not regardless of how you ascertain it, because I spent an immense amount of labor to reach that determination."

On pages 1208-10, printed record, he said:

"A. In my judgment you have to consider two elements: The first is the weight of the freight, and the second is the distance which it travels. All railroad rates are made upon the distance that the freight is going. What I mean by that is, if you go to an agent to ship freight, he does not merely ask you what it weighs, without regard to where it is going, whether from here to San Francisco, or from here to Kansas City. The rate is necessarily based upon the distance which the freight

is going, as much as it is upon the weight. It takes the two elements into consideration: first, the weight of the freight; and, second, the distance it is going.

For the purpose of illustration, you might compare it with the passenger legislation just passed in this State and now under consideration. The rate is so much per passenger per mile. It does not stop with the passenger. It would be absurd to pass a law that the railroad should charge only so much per passenger twenty-five or fifty cents, because the number of passengers is only one element. The distance they are going is another element to be considered.

The ton mile unit takes into consideration both the element of the weight of the freight and the distance it is going; just as the bill passed by the Legislature takes into consideration the distance the passenger is to travel.

Mr. Hagerman: It just says so much per mile.

A. Yes, sir; exactly what the per ton mile unit does. You cannot conceive of a freight rate being quoted of so much per ton. It is all governed by those two elements."

On page 1199 of record, he said:

Eliminating the ton mile, what do you say about that?

A. I would not express any offhand opinion as to the relative cost or the relative profits of the two classes of business, except as the result of mathematical calculation which I made. *I have seen too many opinions expressed in this case that were in my judgment altogether wrong, to care to express just an offhand opinion.*

The opinion I have expressed is based absolutely on the figures we have made, and the study we have made, and the work we have done, in this case, and it is all predicated on the per ton per mile cost.

Q. And, unless you can predicate it upon the *per ton per mile basis*, you have not any opinion to express?

A. I would not care to express an opinion, except it was worked out on the most reliable and scientific basis that would be obtained.

Q. You have not and did not intend to express any opinion whatever, except it is based upon the per ton per mile basis; am I right about that?

A. Yes, sir; you are right."

Again on pages 3039-40 of the record, he said:

"Q. I will ask you to state, Mr. Ludlam, what, in your opinion, is the correct unit of cost and revenue in the railroad freight business?

A. I think the per ton mile basis is the only correct basis. I might explain that by saying *it is the only one that has been devised or is known to railroad men, that is regarded as reliable.*

Q. I will ask you if that is the one which is *generally adopted by railroad companies*, as far as your knowledge extends?

A. *Yes, sir.*

Q. Do the annual reports of railroad companies, which deal with the details of the management, and review its operations from year to year usually show the ton miles and the cost and revenue per ton mile?

A. The published reports of the different companies usually do. And all companies, whether

they publish those figures or not, so far as my knowledge goes, have them in their records.

The Master:

Q. If I understand you, the correct unit of calculation or estimates for accounting in respect of revenue and expenses in conducting railroads, is the *ton mile?*

Mr. Ladd: Yes, so far as freight is concerned.

Mr. Ladd:

Q. Did you hear Mr. Miller's testimony at the previous hearing in this case?

A. Yes, sir.

Q. You agree with Mr. Miller on that point, do you?

A. Yes, sir.

Q. Is there any other method so correct or convincing, of ascertaining the expenses of the earnings of a company, on different classes of freight, as by using the unit of the ton mile, both for cost and earnings?

A. *In my judgment there is not.*"

A. P. TALIAFERRO.

Mr. Taliaferro testified as follows (pages 899-901, record):

"Q. What is your opinion as to the ton mile being the proper basis upon which to arrive, as well as it can be arrived at, at the earnings and expenses of the freight business?

A. *I think it is the only basis. I have thought so from the very first day I began this work.*

Q. That is to say, the most accurate results will be obtained as to the relative cost of making the earnings, by ascertaining the average earnings per ton mile, and comparing those with the average cost per ton mile; is that what you mean?

A. As to the enrnings, that is strictly correct; as to the expenses, I think, that the cost of doing one thing should be compared with the cost of doing another thing; and not with reference to the earnings in any way. Because, for instance, I have here (indicating paper) a carload of dressed poultry from Kansas City to St. Louis; at the present rates a car weighing 20,000 would earn $66.00. A carload of dry hides in bales would earn $40. I cannot see how the cost of handling those two cars would differ. So that 'In proportion to earning' it seems to me is an unknown quantity always.

Q. I mean taking the whole body of the freight business.

A. Taking the whole body of the freight business, of course, the expenses can be worked out. You have the tons, and the tons one mile, and the expenses; and from those figures you get the average expenses per ton per mile.

The Master:

Q. Doesn't the example you give tend rather to prove that the revenue would be a more correct basis than the ton mile basis?

A. I don't think so. Exactly the same weight is handled the same distance, and in one case the revenue is $40.00, and in the other case it is $66.00. If the car costs just the same to handle in both cases, then the cost in proportion to earnings is radically different. And these are not extreme cases.

Mr. Ladd:

Q. If you get the average cost per ton mile of all the freight, and the revenue per ton mile of all the freight, should that be the purpose and intention of any investigation, to ascertain the profits?

A. Absolutely, I think so. It should be the starting point for every comparison.

Q. Why?

A. Because it is a unit which could be used for comparison with the same unit arrived at on any other business. It is the unit and the only one I know of, what is the same in all cases.

Q. What have you to say as to apportioning the expenses of the freight business between State earnings and other earnings in proportion to the revenue derived from the respective classes of business?

A. I don't think that is a proper basis.

Q. Why not?

A. Because the State earnings are made up, generally speaking, of charges based on the full local rates. Whereas, the interstate earnings are made up of just whatever proportions of the through rates may happen to accrue to Missouri on a mileage basis. It absolutely ignores the revenue per ton per mile basis. It ignores the fact, as I believe, that the earnings on State business are greatly in excess per ton per mile of the earnings on interstate business; I am making that only as a general statement, but it has to be so.

Q. The earnings derived, therefore, as I understand you, from a higher schedule of rates; is that what you mean?

A. Yes, sir; and from something like a fixed schedule of rates as compared with interstate earnings which are not fixed in any way. They may vary with every shipment.

The Master:

Q. Do you maintain that a division upon the

revenue basis would wholly ignore the fact that they get higher rates from purely State business?

A. Yes, sir; I do."

On page 3259 he said:

"Mr. Ladd: The exhibits which have been offered on the part of the State here proceeds upon the theory that the closest approach to an accurate result, whether as to cost or as to revenue in the State business, is the theory known as the 'ton mile theory,' the cost per ton mile and the revenue per ton mile?

Now, I will ask you what is your opinion of that theory as distinguished from any other theory that you have heard of. That is, whether by the adoption and application of it results can be more accurately reached than in any other way, and why?

A. *My idea is that it is the most correct basis, and the one that furnishes the best unit for a division of expenses; it is a ton of freight one mile.*"

On pages 3265-7 of record, he said:

"Q. Are you willing to give any kind of an estimate on this broad proposition? Leave to the court the question of determining upon what basis you must ascertain it, and tell me, whatever the cost is of doing the interstate business, how much more it costs to do the State business?

A. *I do not know of but one way by which to make the figures.*

Q. *What is that?*

A. *On the ton mile basis.*

Q. Then you would not listen to any suggestion, or undertake to give any opinion, based upon anything except the ton mile basis?

A. No, sir. I would like to say this, Mr. Hagerman, if I may.

My first impressions of the ton mile were gotten many years ago, when I sat opposite the Chief Traffic Officer of a railroad company, and saw him figure on that basis.

When I got into these cases, and saw them figuring on the *revenue basis*, I thought immediately it was *wrong*, because I know the State business must have been done at a much *higher rate per ton* per mile than the interstate business. I have had that in mind from the beginning, and the more I have thought about it, and the more I have listened to the testimony, and found that the railroads out here were run just as I supposed they were, the more I have become convinced that the *ton mile is the best basis.*

Q. I am assuming you would not swear to it, unless you were convinced that it is so.

A. I am only telling you why I think it is so.

Q. That being so, I am simply asking you whether you would be willing to venture an opinion, that whatever that cost is, and however it is ascertained, how much extra would it be to do the State business?

A. Only on one basis.

Q. You would listen to nothing else, or consider nothing else.

A. *Nothing else would mean anything to me.*

* * * * * *

Q. Will you give me the benefit of an answer

to my question, whether the waste space is in favor of State or interstate, there could not be any comparison upon a ton mile basis, by which you would take into consideration the waste tonnage, because it is an impossibility to make the comparison?

A. The ton mile basis takes into consideration the tonnage and the haul.

Q. Does it take into consideration the waste tonnage?

A. *It does just as much in one case as it does in the other; that is all I can say about it.*

Q. That is all you can say about it?

A. *Yes, sir; just as much in the case of state as in the case of interstate.*"

On pages 4519-22 of record, he said:

"Q. Mr. Taliaferro, I wish you would state what, in your opinion, derived from your experience of all kinds, which you detailed this morning, and your information which you obtained in various ways, including the information you gained from hearing the testimony in these cases, and examining records, and your investigations, what is the proper unit of cost for freight service?

A. I think the ton mile. *It is the best available unit.* It may not be exactly accurate, but it comes nearer representing the weight of the freight, and the distance it is hauled than any other unit.

Q. Likewise, what is the proper unit of earnings in the freight service?

A. The ton mile, I think. It has always been considered an important figure ever since I ever knew anything about railroads, 22 years ago.

Q. Have you or not been corroborated in your

opinion by the testimony of witnesses which you have heard in these cases?

A. I would regard it in that light. I do not know just what the witnesses may have meant.

Q. What witnesses?

A. Going back to the hearings before the Master, I think Mr. Gray of the Northern Pacific bases all his calculation on the ton mile. Mr. Rawn, the General Manager of the Illinois Central, made his figures on the ton mile basis. Mr. Clark of the Missouri Pacific, and Mr. Miller of the Wabash—

Q. Who is Mr. Miller, the General Manager of the Wabash?

A. The Vice-President, I think.

Q. The General Manager?

A. Vice-President and General Manager, I believe.

Q. *Do you happen to know whether any railroad companies keep statistics in their office as to the cost per ton mile of handling freight?*

A. *Yes, sir; I think quite a number of them do. The roads in whose offices we have gone in this work do.*

Q. *What offices?*

A. The Wabash, the Missouri Pacific and the *Burlington railroads.* I speak of those from a little more intimate knowledge than I have of the others.

Q. What, in your judgment, is the basis upon which the expenses of doing state and interstate business ought to be divided between those two classes of business?

A. I know of nothing more correct than the ton mile. We have considered every basis that has been suggested, and our conclusion is that that is the most correct basis.

Q. What is your objection, or what objection can you state, if there is any objection which is a good one, to dividing these expenses on the basis of the revenue derived from both classes of business?

A. *I don't think the revenue has anything to do with the cost, Mr. Ladd.*

* * * * * *

Q. So far as your experience with railroads and railroad accounting goes, have the railroads undertaken in their systems of accounting to ascertain the cost per ton mile?

A. *Yes, sir; so far as I know all the roads do it. At least I believe I could say that is generally done without fear of contradiction.*"

B.

IT COSTS MORE TO HANDLE INTERSTATE FREIGHT LESS THAN CARLOAD LOTS THAN IT DOES STATE FREIGHT LESS THAN CARLOAD LOTS.

Interstate business in less than carload lots (and this is the expensive part of the business) received by the complainant at its important eastern and western terminals in Missouri from a connecting road is, at the point of connection, unloaded from the car of the connecting road, loaded into complainant's warehouse, and then reloaded into one of complainant's cars in a train, for its point of destination within the State. As to such business the terminal charges for interstate business are larger than for State business, because at the point of connection there is one additional unloading.

In the case of less than carload State business there is one loading at the point of origin and one unloading at the point of desination. In the case of interstate less than carload business, under the circumstances just mentioned, there is one unloading at the place of connection, a loading into the car at that place, and another unloading at the point of destination.

The testimony upon this point is very clear (p. record, 872).

C. S. Ludlam, one of the State's experts, testified as follows:

> "Q. Mr. Ludlam, in your judgment, is the cost per ton mile of handling State less than carload business any greater than the cost per ton mile for handling less than carload interstate business?
>
> A. No, sir.

Q. Why?

A. The cost of handling interstate less than carload business, in my judgment, would be more than handling the State less than carload business for two reasons principally:

The first one is that the majority of interstate less than carload business is unloaded at the station and then reloaded and then unloaded at destination. That means that interstate less than carload business is loaded once and unloaded twice. Whereas, State less than carload business is loaded once and unloaded once."

Mr. Taliaferro, one of the State experts, testified as follows (pp. 898-9 and 3022, Record):

"Q. Based upon your same knowledge and information, I will ask you whether, in your opinion, it costs any more to handle State less than carload freight than interstate less than carload freight, per ton mile?

A. I think it costs less to handle interstate less than carload freight.

Q. It costs less to handle interstate less than carload freight?

A. Yes.

Q. Than it does to handle the State less than carload freight?

A. Yes, sir.

Q. Why? What is the difference?

A. The idea I have in my mind is, that it is not practicable to load less than carload freight for a long haul. It has to be handled and rehandled many times in going a long distance. Freight coming from Chicago, we will say, by the Burling-

ton, to a point in Missouri, might be, and I think from the information I have gotten about these matters generally since I have been looking into them, would be rehandled at Hannibal; or any other road would have to receive the shipment from the connecting line at the Mississippi river, unload it, and reload it in some car going out over their line. Whereas, a shipment starting from Hannibal or St. Louis would be delivered into the freight house at the proper door, just where it would be put right into the car that the company would use for forwarding it.

Q. Would the cost in that respect of handling interstate less than carload freight be greater or less than the handling of strictly State less than carloads?

A. I think it is more.

Q. You said awhile ago you thought it was less.

A. If I recall, I think I said the cost of handling less than carload interstate business in the State of Missouri was, to my mind, more than the cost of handling State less than carload freight.

Q. I think you turned it around in answer to my first question.

A. I didn't intend to.

The Master:

Q. Your judgment is, it costs more to handle interstate less than carload freight?

A. Yes, sir."

And the testimony of Mr. Bethard, superintendent of transportation of the Missouri, Kansas & Texas Railroad Company, is to the same effect. (Record, Vol. II, pp. 1830-1.)

Mr. Miller, general manager of the Wabash Company, describes the same course of business.

Thus we see these able and efficient experts who testified upon behalf of the State and who possessed large experience in the operation of railroads and in the matter of railroad cost accounting and in the auditing of many of the largest railroad companies' books in the United States and who were fair, unprejudiced and unbiased by financial or personal interests, and who were pre-eminently qualified to do so from actual experience and from actual facts ascertained from careful and candid investigations, have denounced the "gross revenue theory" testified to by the employes of the railroad companies and which revenue system was adopted by Judge McPherson in this case for the division of expenses between State and interstate freight.

These same experts, without exception, and in candor, declare that the cost *per ton per mile* is the only basis upon which to ascertain the costs for the two classes of traffic. They defend that position and denounce the gross revenue theory by sound reason, examples and facts that are convincing and unanswerable.

We find that when the railroads' employes said that it cost on the revenue basis seven times as much to haul State freight as it did interstate freight, that it was tantamount to saying that it cost *fourteen times* as much to move a ton of State freight one mile as it did a ton of interstate freight one mile. This is so absurd and so shocking to one's intelligence that to make the statement is to denounce it.

It might be well here to say that Mr. Taliaferro testified (Record, Vol. IV, p. 45, 54) that it cost about 29.07 per cent more to handle State freight than it did interstate freight on the "*ton mile basis.*" And Mr. Ludlam said 25 per cent (pp. 924, 932, 3045-6). The court must remember that this

is very different from saying it cost 50 *per cent more on the "gross revenue basis,"* because on the *gross revenue basis* that would be *three times* as much to move a ton of State freight as a ton of interstate freight.

C.

THE RAILROADS' OFFICERS AND EMPLOYES WHO TESTIFIED IN THIS CASE WERE FORCED TO ADMIT THE CORRECTNESS OF THE TON MILE THEORY.

The experts for the State are not alone in the opinion that the cost per ton mile is the measure, and that cost cannot be ascertained by a contemplation of revenue. They are supported in their view by the opinions of some of the most conspicuous witnesses for the complainant expressed in unmistakable, and sometimes emphatic, terms.

Mr. Elliott says that the ton mile "is a very good unit to compare with." (Record, Vol. I, p. 476.)

Mr. Willard, the vice-president of the complainant, speaks always of the relative expense "per ton mile." (Record, Vol. I, pp. 512, 517, 519, 524, 527.)

Mr. Rawn, general manager of the Illinois Central Railroad Company, says: "We do compute our cost upon what is called a ton mile basis." (Record, Vol. I, p. 578.)

Mr. Gray of the Northern Pacific Railroad Company, in all his experiments and computations, seeks to arrive at the *cost per ton mile*. (Record, Vol. I, pp. 622, 623, 624, 628, 644-5, 652, 663, 680.) And being asked whether he thought it the best and proper basis upon which to reach the ultimate expense, he said: *"I think it is the only basis"* (p. 645). He also said that in ascertaining the actual cost of doing the work *"the question of revenue cuts no figure whatever"* (p. 680).

Mr. Stuart, general manager of the Erie railroad, says that he *"adopts the system of per ton per mile in ascertaining earnings and cost of operating" on his road.* (Record, Vol. I, p. 698.)

Mr. Clark, division superintendent of the Missouri Pacific railroad, said that he was a "*ton mile man*," and all his estimates of expense were upon the basis of the ton mile, and that he accepted it "*because it is used so generally.*" (Record, Vol. II, p. 1646.)

Mr. Fisher, supervisor of weighing and inspection for the Missouri Pacific Railroad Company, after testifying that in his opinion it cost from two to six times as much to earn a dollar in State freight business as to earn a dollar in the interstate business (Record, Vol. IV, p. 1753), said that while he knew that railroad companies used the ton mile basis of cost for statistical purposes, it should not be "used *in a performance of this kind*" (p. 1754).

Mr. Tyler, general superintendent of 2,000 miles of the lines of the St. Louis & San Francisco Railroad Company, said that his company kept an *accurate account of the cost per ton mile of moving freight.* (Record, Vol. IV, pp. 4104, 4129, 4131-2.)

Mr. Doddridge, former general manager of the Missouri Pacific railroad, while condemning it in his opinion as a witness, says that the *ton mile as a basis of calculation for ascertaining cost, is used by the Interstate Commerce Commission and by railroad companies "for statistical purposes.*" (Record, Vol. II, p. 1585.)

Mr. Miller, general manager of the Wabash railroad since May, 1905, and who for twenty-five years immediately preceding, had been connected with the railrad of the complainant in Missouri as general superintendent, division superintendent, assistant superintendent, and in other capacities, testified as a witness for his company, and said: "*Our unit is ton miles.*" (Record, Vol. II, p. 2836.) He said that the annual reports of his company for each of two years then shown to him, exhibited the cost per ton mile of transporting freight on the Wabash system; that the preparation

of such a statement involved great labor and was for the purpose of showing the ton mile revenue and the ton mile cost; that the ton mile is is the unit, and that it *"is the unit that is generally used"* (pp. 2839-40).

He testified (p. 2840 of record):

"Q. In order to reach that result, let me see if I understand how it is attained: You take each shipment, interstate or intrastate, and suppose it is a ton, you multiply that ton by the number of miles you carry that shipment; and you deal with all the shipments that way, and the aggregate of those ton miles produces your total ton miles. Is that right?

A. I think that is the way they get at it.

Q. Was not my question quite clear?

A. Oh, yes.

Q. That is the way it is done?

A. Yes, sir.

Q. Then you divide your total revenue from freight by the total number of ton miles, and you get your revenue per ton mile, don't you?

A. Yes, sir.

Q. And you divide your total freight expense by your total ton miles, and you get the cost per ton mile, don't you?

A. Yes, sir.

Q. *And you regard the ton mile as the unit, and the cost per ton mile and the revenue per ton mile, as indicating more exactly than by any other method that can be pursued, the condition, prosperous or otherwise, of the freight business of the system; isn't that right?*

A. *Yes, sir.*

Q. *And is that a custom which prevails among the railroads generally?*

A. *Yes, sir.*

Q. *Then the cost per ton mile is the unit of expenses in the freight business?*

A. *Yes, sir.*

All his estimates of relative expense were of expense per ton mile (pp. 2851, 2860, 2872, 2900).

> "We do not use the train mile unit in our comparisons, because it does not represent the modern unit, either in comparing or in our statistics." (p. 2903.)

On pages 2904-5, he said:

> "Q. What is a ton mile?
>
> A. It is the movement of a ton of freight one mile.
>
> Q. And how do you get at the cost per ton mile?
>
> A. By computing the mileage over which the tonnage is handled and finally dividing the total tonnage carried one mile into the total expenses. The cost of conducting transportation, and those things that appear in that sheet, under the head of 'Operating expenses,' were reached by dividing the tonnage of the trains into the cost, and there is the result.
>
> Q. As I understand you, at one time the method employed was the cost per ton per train mile. Is that true?
>
> A. Yes, sir.
>
> Q. Did I understand you to say that that method has now been abandoned?
>
> A. Most of the roads have up-to-date operating statistics, such as those are (indicating), but

pay no attention whatever to the train mile. That was the unit formerly used on the Wabash, and we abandoned it because it did not reflect the actual operations of the railroad and the cost. And it did not show by accounting divisions each train run: an accounting division is practically a train run; so that these results show the cost of operating each train by itself, even on the branches. The plan is to find out where the leaks are, locate them, and plug them.

Q. Is it generally conceded by railroad people that the train mile cost does not correctly indicate the cost of handling freight business?

A. Yes, sir.

Q. And that method has been abandoned by railroad people?

A. As a unit.

Q. As a unit?

A. Not entirely. We include it because that form of statistics shows it, but do not use it in any way."

Mr. Minnis (p. 2906):

"Q. Mr. Miller, if I understand you, in arriving at the cost of freight per train mile you add together the entire number of miles that are covered by freight trains during a given period and you divide that aggregate into the aggregate cost for the same period, and that gives you the cost per mile. Is that correct?

A. That is the way the train mile is reached.

Q. In order to get the average tonnage of trains, you take the total tonnage of all trains and divide that by the number of trains that carried that tonnage, don't you?

A. Yes, sir.

Q. According to this method the train mile cost will be less where the average train tonnage is less, than it would be where the average train tonnage was greater, wouldn't it?

A. Yes, sir.

Q. That is necessarily so because it does cost some more to carry a heavy load than a light load, doesn't it?

A. Yes, sir.

The Master:

Q. That system then would be in the direction of putting a premium on light trains?

A. Yes, sir; that is the reason it was discontinued as a unit of determining the cost of transporting and handling freight. The best showing could be made by running the trains light, on a train mile basis. But that is not true on the ton mile basis. *You get down to "brass tacks" on ton mile.*

Q. *You get down to the actual conditions on the ton mile.*

A. *Yes, sir.*"

Shortly after the decree was rendered in the court below, the late Mr. E. H. Harriman expressed his views upon various subjects in an interview which was published simultaneously in all the leading papers in the country. Among other things, he said:

"How would you effect a reduction in the expenses of the government?" was asked.

"By applying the *cost per ton per mile rule, so to speak, by which the railroads effect their economics.* I mean by that, that the railroad managements *know what it costs them to transport a*

ton of freight one mile and are governed accordingly, and, furthermore, *they are constantly striving to reduce that unit of cost.* If this principle were to be applied to the financial problems of the government you would see a marvelous change within a few years. In the management of the government there should be more thought of what is right and less thought and less care about political success."

The Chicago Record-Herald of April 1, 1909.

The railroad companies have then, in this litigation, abandoned their own "unit of cost;" they have deserted their own established system of cost accounting; they present here and in this case a new "unit of cost" unknown to the railroad systems. In the place of using their own "unit of cost," they now offer another method, another unit, which, in the practical and actual management of their business they ignore, to wit, the "gross revenue basis." The trial court passed by the "unit of cost" used by the railroads in actual business operation and accepted as gospel truth the substituted basis of cost accounting, a basis which has condemnation stamped upon its face, not only by the State's experts, but by the roads themselves, and by that reason which appeals to the consciences of men and tells them when they are traveling upon the highway of justice.

D.

THE COURTS CONDEMN THE GROSS REVENUE THEORY AND PROCEED UPON THE BASIS OF THE TON MILE THEORY.

There can be no question in the minds of this or any other court as to the accuracy of the statements of the late Mr. Justice Brewer in the case of Ames vs. Union Pacific Railroad Company, 64 Fed. 182, in addressing himself to this same subject and wherein he held that there was no relation between expenses and revenue and that under changed conditions as to rates:

> "Obviously the cost of transportation would be the same, whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by House Roll 33."

This ought to clearly demonstrate to the Court the manner in which the application of the revenue theory will, under differential rates or in any event where the rates are not on an absolute equality work a hardship on one or the other in accordance with the general disparity between rates, when the expenses are apportioned on the ratio that the gross revenue of the one bears to that of the other. The factors are not equal. A division of expense with unequal factors is bound to be wrong. All the State's witnesses and part of the railroad men sustain Justice Brewer. They said that revenue had nothing to do with it. That revenue had no possible relation to cost.

The late Mr. Justice Brewer, in Chicago, Milwaukee & St. Paul Railroad Company vs. Tompkins, 176 U. S. 176, reversed the case because of the application of the revenue

theory in finding values, and shows by an example how absurd the theory becomes when thus applied, saying:

> "Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one-half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving $500,000 the company only received $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns six per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business—six per cent. So that

> although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced."

If the revenue theory cannot apply in finding values, it cannot apply in finding expenses, the other important factor in the problem.

In the case of Atlantic Coast Line Company vs. Ellis, 203 U. S. 256, at page 260, the late Mr. Justice Brewer, speaking of the difficulty, used this significant language:

> "We are aware of the difficulty which attends the proof of the cost of transporting a single article and in order to determine the reasonableness of a rate prescribed it may sometimes be necessary to adopt as a basis the average rate of all transportation *per ton per mile.*"

The complainant cites the case of Smyth vs. Ames, 169 U. S. 466, as an authority for the revenue theory. It is not an authority upon that proposition. The revenue theory was not presented to them. The Court had no opportunity to make a choice as to theories or bases upon which to make a division of expenses between State and interstate traffic. A reading, however, of the opinion discloses that the property was divided upon the mileage basis and the expenses upon the basis of the per ton per mile. At page 529, Mr. Justice Harland, in speaking of the alleged extra cost of carrying local freight, says expressly that the extra cost of local as against through freight is so much per ton per mile. The tables on pages 530, 531, 532, 536 and 538 are all figured upon the basis of carrying one ton of freight one mile and

one passenger one mile; that is, the freight per ton per mile and the passenger per mile. This Honorable Court has never passed away from this per ton per mile and passenger per mile method.

It may be properly mentioned at this point that the Circuit Court of the United States in the District of Nevada, in Southern Pacific Co. vs. Bartine, 170 Fed. 725, rejected the view that expenses can be ascertained by a comparison of earnings.

The matters contained in this division of our brief alone should be sufficient to condemn as error the adoption of the "gross revenue basis" by the Court for the division of expenses between State and interstate traffic, both as to freight and passenger business.

The learned trial judge adopted the "gross revenue" basis because of its *simplicity;* but is *simplicity* to displace *accuracy* and *justice?*

PASSENGER—DIVISION OF EXPENSE BETWEEN STATE AND INTERSTATE.

I.

THE SO-CALLED REVENUE BASIS OF APPORTIONING EXPENSES BETWEEN STATE AND INTERSTATE BUSINESS WAS ADOPTED BY THE COURT, THAT IS, THE RATE PER PASSENGER MILE FOR STATE TRAVEL BEING HIGHER THAN FOR INTERSTATE TRAVEL, IT WAS ASSUMED THAT THE COST OF CONDUCTING THE BUSINESS WAS HIGHER, AT LEAST IN LIKE PROPORTION. THIS WAS WRONG, AND THE EVIDENCE SHOWS THAT THE RATES FOR STATE AND INTERSTATE TRAVEL WERE FIXED WITHOUT REGARD TO THE RELATIVE COST OF EACH KIND OF BUSINESS.

A.

The passenger side of the case is fully presented in our main brief, from pages 318 to 394, and to which we can add but little.

The fundamental and vital principles presented and discussed in the preceding parts of this brief as to the Court's many errors on the freight side of the case and as to why the expenses as to State and interstate freight cannot be divided upon the gross revenue basis, will apply with equal force here. If the finding and decree of the Court fails as to the freight side it would necessarily fail as to the passenger side.

The average rate received for State travel is higher than the average rate received for interstate travel. Prior to the enactment of the two-cent maximum, it was 2.44 cents per mile in State business and 2.10 cents in interstate.

After the enactment of the two-cent maximum, the rates, respectively, were 1.96 cents and 1.83. (Record, 5-5096.) In its accounting the company apportions expenses among its different kinds of business according to the revenue derived from each. The court adopts this as a basis upon which *costs of service* are to be determined.

This, we submit, is manifestly erroneous, unless the cost of doing business was first ascertained and the charge for doing it determined by that cost. Unless this was done, the revenue basis leads to the absurdity *that the cost of service is increased by the mere fact of an increase in the charge or rate therefor, and is decreased by a decrease of the charge or rate therefor.*

There has been no attempt here to show that *rates were fixed originally with reference to relative cost*, and on the contrary, the evidence is all to the effect that a uniform mileage rate was imposed for all travel, State and interstate, and that the lower existing rate for interstate travel is due entirely to competitive conditions.

Mr. William Ellis, commerce counsel of the Chicago, Milwaukee & St. Paul Railway Company, testifies that his company does not and never did adjust charges to the expense per passenger mile of running its various trains, and that a uniform mileage rate had always been exacted except as competitive conditions reduced the rate on the longer journeys. (4-4236 and 7.)

Mr. P. S. Eustis, the passenger traffic manager of the Burlington company, testifies that the usage of his company, and, indeed, of all companies, was the same from the very beginning, and for the reason he says that wherever it has been regulated, the charge has been fixed upon the mileage basis by statute, "and where the individual had freedom to do as he pleased it were folly to adopt any other basis." (4-4371-4374.)

If the rates for State and interstate passenger travel were the same, then the *equality* of rates (if the quality of service rendered was the same) on the *revenue basis* would give *equality* of cost. But we find interstate rates are lower and have been lowered from time to time by competitive conditions, cost not being taken into account. Now, if the *revenue basis of determining cost* be adhered to, we are driven to the conclusion that the *cost* of interstate service has been correspondingly *reduced. That the sharper the competition, the greater the reduction and the greater the reduction the lower the cost. This too, although we find this same competition has brought about faster trains, parlor, pullman, buffet and observation cars, finely, expensively and magnificently equipped, carrying with it a superior and more expensive service than is rendered in its absence. As to how such reasoning and philosophy or logic could commend itself is more than we can understand.*

A reduction of rates required by law has no such effect. "Obviously," says the late Mr. Justice Brewer, in Ames vs. Union Pacific Ry. Co., 64 Fed. 165 l. c. 182,

> "The cost of transportation would be the same whether the companies received the prices which they did, in fact, receive, or the reduced rates prescribed by house roll 33."

Commenting on this in the case of Southern Pacific Co. vs. Bartine, 170 Fed. l. c. 757, Judge Farrington said:

> "This statement seems too clear to require demonstration or the support of authority; and it is equally clear that the cost of transportation would be the same whether the rates and the resulting gross income be increased or decreased. The mere fact that a man receives $20 rather than $10 for performing a service cannot increase his expenses."

The cost is incurred regardless of the return received for the service, and must, therefore, be independently ascertained. The expense cannot be inferred from the income, especially so, in the railroad business, where all the experts concur in saying that rates are not based on costs.

This court condemns the gross revenue theory in finding values in the case of St. Paul Railroad Co. vs. Tompkins, 176 U. S. 176, from which we have heretofore quoted. If it cannot apply to values it cannot apply to expenses.

THE SERVICE RENDERED IS AN IMPORTANT FACTOR TO BE CONSIDERED IN DIVIDING THE EXPENSE BETWEEN STATE AND INTERSTATE TRAFFIC.

The service rendered is a very important factor in determining the propriety of the rate and in the division of the expenses. The revenue theory adopted by the trial court disregards the quality of the service and burdened State passenger traffic with expenses incurred for the benefit of interstate business and with the cost of conveniences to interstate travel, and which resulted in inconvenience to State travel, thus charging State travelers for *disservice*, rather than for *service*, and making those pay *most* who get *least*.

If the expenses between State and interstate passenger traffic should be divided on the passenger mile basis, then there must be added to the expense of handling the interstate passenger traffic the additional per cent which represents the outlay, cost and expense of the *kind and quality of service rendered interstate passengers by the fast trains, parlor, buffet and observation cars and other superior and expensive service and conveniences given it.*

The revenue theory adopted by the court followed to its legitimate end, is the lower the interstate rate, the faster and finer the train, the more splendid the service, then the cheaper the cost to the company. Under the trial court's logic this is bound to be the result, because the less the revenue

from the operation of the train the less the expense assignable for running it. If the trial court's position is correct, then the road can continue to reduce its interstate rate until finally it charges nothing, but operates its train free, and there would be no expense assignable to the interstate traffic therefor. It could run its finest and most gorgeous and splendidly equipped interstate train, and render a service fit for a king, and there would be no expense attendant, because having received no revenue no expense could be assigned. The absurdity of the basis is so apparent it would seem idle to discuss the question.

It is not contended that there should be any discrimination in favor of State travel, but it is insisted that there is no right to discriminate against it. If the company for its own convenience and profit chooses to establish through trains and compel the State passenger to travel on local trains, it may perhaps do so; but if the expense of conducting the local business considered apart is thereby increased because of it, it cannot properly be imposed upon the local business, because the increase was not incurred for the benefit of that business.

The State has the right to require that the interests of its people be considered and fully and fairly served, and that the company cannot exact rates without reference to the fair value of the property used for the public *or the fair value of the service rendered.*

Minneapolis & St. Louis R. R. Co. vs. Minnesota, 186 U. S. 257.

Lake Shore R. Co. vs. Ohio, 173 U. S. l. c. 301.

Cleveland, etc., R. Co. vs. Illinois, 177 U. S. l. c. 521.

Missouri Pacific Ry. Co. vs. Kansas, 216 U. S. 262.

Atlantic Coast Line case, 206 U. S. 1.

Smyth vs. Ames, 169 U. S. 466.

Covington, etc., Turpike Co. vs. Sanford, 164 U. S. l. c. 596.

B.

UNDER THE REDUCED PASSENGER RATE, STATE REVENUE INCREASED $138,702.92, OR NINE AND TWO-FIFTHS PER CENT.

When the two cent passenger fare law was placed in effect the complainant, *for convenience and business reasons, and to meet competition, voluntarily reduced the interstate rate from* 2.10 *to* 1.83 *cents per mile.* (Record, Vol. V, p. 5096.)

The actual effect of the year (1908), when the two-cent passenger law was tested and tried by appellee was as follows, same being a comparison between the years 1907 and 1908:

1. The number of passengers carried in 1908, increased twenty per cent over the number carried in 1907. (4-4383.)

2. The passenger miles increased during the same year something more than thirty-three and a third per cent. (4-4384.)

3. The total revenue from passenger travel in Missouri, State and interstate for the fiscal year 1907, was $3,348,-753.09. (4-4375.)

4. The revenue from State passenger travel alone in Missouri, for the fiscal year 1907, was $1,473,000. (4-4384.)

5. By subtracting the revenue from State passenger travel, $1,473,000, from the total passenger revenue, $3,348,-753.09, we get the revenue from interstate travel in Missouri for the fiscal year 1907, viz.: $1,875,753.09.

6. As the rate for State travel for 1907 was 2.44 cents per mile, the number of passenger miles made during that year in State travel was $1,473,000, divided by .0244, which equals 60,368,852.

7. As the rate for interstate travel for 1907 was 2.10 cents per mile, the number of passenger miles made during that year in interstate travel was $1,857,753.09, divided by .021, which equals 89,321,576.

The number of passengers in State and interstate travel respectively for the year 1907, can be ascertained by dividing the number of passenger miles by the average length of journey.

We get, then, the following table:

	1907.	1908.	Increase for 1908.
Interstate passengers.....	910,793	987,808	77,015
State passengers.....	1,978,009	2,695,868	717,859
Total passenger miles.....	149,690,428	179,139,174	29,448,726
Interstate " "	89,321,576	96,872,744	7,551,168
State " "	60,368,852	82,266,410	21,897,558
Total passenger revenues.....	$3,348,753.09	$3,389,491.19	$40,738.10
Interstate " "	$1,875,753.09	$1,777,788.27	(dec)$96,964.82
State " "	$1,473,000.00	$1,611,702.92	$138,702.92

Here, then, is an increase in the volume of business for the fiscal year 1908, in every respect, state and interstate. There is a greater number of passengers in each class and a greater number of passenger miles.

The total revenue for the year shows an increase, and there is a substantial increase in the State passenger revenue. It earned more revenue under the reduced rate (two-cent rate), than under the three-cent law, and did so with a cheaper and more inferior service. The interstate shows a loss, the increase in the volume of travel not having been sufficient to compensate for the reduction *voluntarily made by the company for business convenience or to meet competition from* 2.1 *cents per mile to* 1.83 *cents per mile on its interstate traffic.*

A comparison of 1908 under the two-cent passenger fare law with the year 1907, under the three-cent passenger fare law under the above facts, discloses that under the two-cent rate the number of passengers increased 717,859 or 36 per

cent, the number of passenger miles increased 21,897,558 or 36 per cent, and appellee's revenue on passenger traffic increased $138, 702.92 or 9 2-5 per cent. This, too, in the face of a nation-wide panic, and a year of great depression. The facts belie the charge that the rate is confiscatory.

The court erred in finding that the *intra*-state passenger traffic cost at least 25 per cent more than the interstate passenger traffic, because the evidence does not support such finding, and in fact is exactly contrary thereto, as has been heretofore in this brief fully explained. The fact is that the *intra*-state passenger traffic is carried on at a smaller ratio of expense than the interstate. Such facts are so evident and so generally well known as to need no further argument or demonstration.

The fact of the matter is, that as to the passenger traffic it is the *local business* which produces the greater profit for the railroads. It requires no special training, deep insight, or extraordinarily keen intelligence to understand what is actually the fact, that for the most part the *intra*-state passengers are carried in the local trains, which trains are composed of *two or three light coaches, carrying say* 100 *passengers, as against the movement of the interstate and through trains* on which, by far the larger percentage of interstate passengers are carried, whose weight will average from *two to six times* that of the local passenger trains and whose carrying capacity is much less than that of the locals in proportion to the number of cars.

Under these conditions can any of these railroad officials attempt to maintain, with a hope of being credited, that a *local train*, carrying principally *intra*-state passengers in *light coaches, heavily loaded, will cost from* 10 *to* 50 *per cent more to operate than an elegantly equipped through train weighing from four to six times as much and carrying probably less than half the number of passengers, most of*

whom are through or interstate passengers? It is preposterous to make such claims without showing the reasons or basis for the claims. Must they not make proofs? It is generally conceded, and a true exposition of the conditions will prove beyond a question of doubt, that the interstate passenger is carried for a *smaller revenue, and with much larger percentage of expense, than the intrastate passenger.*

C.

HOW EXPENSE ACCOUNTS ARE MADE UP.

It is easy to inflate expenses for any period as a mere matter of accounting or bookkeeping.

For example, in 1905, the Burlington Company charged operating expenses with five hundred and fifty thousand dollars for the reconstruction of the bridge over the Missouri river at Kansas City. (5-4756.) Manifestly the cost of rebuilding a bridge should be distributed over a period approximately equal to the life of the bridge. But this bridge has not been rebuilt to this day. The old bridge is still in use. *Not one dollar of the five hundred and fifty thousand dollars charged on this account to operating expenses in* 1905 *was expended during that year, or had been expended, when the testimony in this case was closed.* (5-4757.) This item alone is almost equal to the alleged increase of expenses in 1905 over 1904. This large item might as well have been charged to one year as another, or just as well not charged at all. The only thing that could be justified in this connection would be a depreciation charge of a substantially equal amount for each year.

Why was this extraordinary charge made to 1905? Freight rates were reduced by the Legislature of Missouri in that year, and there was an interest, and interest is often an inducement, to charge that year more heavily than preceding ones with expenses.

How much of the amount charged as operating expenses for the fiscal year 1908 is of this sort? We do not know, but there is something very suggestive in the testimony, and we do know that the sum charged for 1908 is in gross and percentage very and exceptionally large.

The gross sum of expenses for Missouri for the calendar year 1905 was $8,277,223.41; for the year ending June 30, 1908, it is put at $10,301,534.53, an increase in amount, after an intervening period of only eighteen months, of $2,024,311.12, or twenty-five per cent., and the latter year one of enforced economy in expenditure.

In the earlier years for which we are given figures, the expenses for Missouri are less in the percentage to earnings than for the average of the system, while for the later year, the percentage is higher.

We have definite reports for the entire system for the years ending June 30, 1904, 1905 and 1906. These show (2-1321 *et seq*):

EARNINGS.

1904.	1905.	1906.
$63,984,377.49	$65,162,858.02	$73,413,385.88

OPERATING EXPENSES.

$41,353,874.51	$41,479,169.43	$50,655,161.43

TAXES.

$1,862,181.53	$1,840,627.35	$2,018,494.16

This shows that for the year 1904, operating expenses, including taxes, were 67 per cent. of the earnings, in 1905, 66 per cent., and in 1906, 71 per cent.

For the period for which we can make comparison, the calendar years 1904 and 1905, the advantage is distinctly with the State of Missouri in the matter of economy of operation, 60 to 65 per cent. of earnings consumed in expenses as against 66 to 71 per cent. for the system as a whole.

The gross earnings for the system for the year ending June 30, 1908, were $77,748,161.52, and the operating expenses were $55,268,407.48, thus the operating expenses were 71.08 per cent of the earnings for 1908 (pages 68-9, Bulletin No. 5 of Revenues and Expenses of Steam Roads in United States, issued by Interstate Commerce Commission). For

year 1909 the operating expenses were only 69.50 per cent. (same Bulletin).

The operating expenses for Missouri being put at 82.63, the conditions previously existing are reversed in Missouri, instead of being below the average of the system in proportion of expenses to earnings, is about twelve per cent. above.

II.

THE COMPLAINANT HAS UTTERLY FAILED TO MEET THE RULE AND FURNISH THE PROOF. ITS TESTIMONY IS NOT SUFFICIENT. IT HAS FAILED TO MAKE A FULL DISCLOSURE TO THE COURT AND HAS NOT ATTEMPTED TO ACCOUNT FOR ENORMOUS EXPENSE ITEMS NOR TO ACCOUNT FOR ITS ABNORMAL OPERATING EXPENSES FOR THE YEAR ENDING JUNE 30, 1908.

We apprehend no disinterested man can read the record without saying the complainant has failed to make the proof. That it has failed to prove the actual amount of its expenses for handling state and interstate freight, and made no effort to prove its actual expenses in handling state and interstate passenger traffic.

The complainant increased its expense of maintenance of way and structure for the year ending June 30, 1908, about $2,000,000.00, or, to be exact, an increase of over 81 per cent, and offered no reasons in explanation thereof. The rule of law required it to do so, having failed to offer the proof or make a disclosure, the court cannot accept it for the purpose of overturning the legislative enactment of a state. The fact is, the road either did not have such an expense or it was permanent and lasting improvements which must be charged as an expense to the number of years which would measure its life.

Can this court read the record and not have a doubt? A real, candid, substantial doubt. Can the court say that the complainant has presented a case which clearly shows beyond all doubt and by evidence clear and convincing that the rates are confiscatory? Can the court say the complainant has met the requirements of this Honorable Court in such

cases as we now present, and with extracts therefrom, as follows:

Chicago & Grand Trunk R. Co. vs. Wellman, 143 U. S. 339, was a suit to annul a statute reducing passenger rates on the ground that its enforcement would prevent reasonable earnings on investments in property of the railroad. The amount of the operating expenses was stipulated by the parties, or stated by two witnesses, without disclosing fully the nature of the different items. In deciding this case, Justice Brewer said:

> "It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends." (*Chicago & Grand Trunk R. Co. vs. Wellman*, 143 U. S. 345.)

In addition to this, Justice Brewer, in the case above cited, further said:

> "Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the

jury that an act fixing a maximum rate at two cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? * * * We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we haave no knowledge outside thereof and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how carefully they should be to not declare legislative acts unconstitutional upon agreed and general statements, and *without the fullest disclosure of all material facts.*"

In the cases at bar the carrier has stated in general terms what its gross receipts and operating expenses were. It has failed to make a full disclosure of what these operating expenses consist. It has not disclosed that material items thereof were reasonable or necessary. So far as the evidence in these cases is concerned, it does not present for the company as strong a case as that presented by the stipulated facts in the case of *Chicago & Grand Trunk R. Co. vs. Wellman supra*, The insufficiency of the evidence in the case at bar is more glaring than the insufficiency of the testimony in the Wellman case. If the law could not be stricken down in the *Wellman Case*, on account of the insufficiency of the disclosure of facts made by the railroad company, it surely could not be stricken down in this case.

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." (*San Diego Land & Town Co. vs. National City*, 174 U. S. 739.)
>
> "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind." (*Knoxville vs. Knoxville Water Co.*, 212 U. S. 18.)
>
> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." *Smyth vs. Ames*, 169 U. S. 544, 547.)

It will be noted that the matter is limited in the one sentence to the *value of the property employed*, and in the other sentence to the *value of the services rendered*.

In *Wilcox vs. Consolidated Gas Co.*, 212 U. S. 54, the late Mr. Justice Peckham said:

> "Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the state of New York are in fact confiscatory."

In *Knoxville v. Knoxville Water Co.*, 212 U. S. 16, Mr. Justice Moody said:

"In the first place no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts. * * * Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Not even the agreed statement of facts between witnesses of the parties will be conclusive for the court, as is clearly shown in the case of *Chicago & Grand Trunk Ry. Co. vs. Wellman*, 143 U. S. 345, wherein it is held:

"Courts should be careful not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

In *Chicago & Grand Trunk R. Co. vs. Wellman*, 143 U. S. 343, Mr. Justice Brewer in his opinion says:

> "Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? At any rate, must the court assume that it has no such effect; and ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings?"

In consideration of the fact, our case, both as to freight and passenger acts involved, has been fully discussed and presented in our former briefs, we will not pursue the subject further in this supplemental brief but submit the cause, and ask this Honorable Court to reverse and remand case No. 130 and order the dismissal of the original, amended and supplemental bills.

Respectfully submitted,

ELLIOTT W. MAJOR,
Attorney-General,

JOHN M. ATKINSON,
Assistant Attorney-General,

Attorneys and Counselors for Appellants in case No. 130, and for Appellees in case No. 134.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 676. Knott et al., Appellants, v. St. Louis & Southwestern Ry. Co.

No. 677. St. Louis & Southwestern Ry. Co., Appellant, v. Knott et al.

No. 686. Knott et al., Appellants, v. Missouri Pacific Ry. Co.

No. 687. Missouri Pacific Ry. Co., Appellant, v. Knott et al.

No. 688. Knott et al., Appellants, v. St. Louis, Iron Mountain & Southern Ry. Co.

No. 689. St. Louis, Iron Mountain & Southern Ry. Co., Appellant, v. Knott et al.

No. 692. Knott et al., Appellants, v. Quincy, Omaha & Kansas City R. R. Co.

No. 693. Quincy, Omaha & Kansas City R. R. Co., Appellant, v. Knott et al.

No. 694. Knott et al., Appellants, v. Wabash R. R. Co.

No. 695. Wabash R. R. Co., Appellant, v. Knott et al.

No. 696. Knott et al., Appellants, v. St. Joseph & Grand Island Ry. Co.

No. 697. St. Joseph & Grand Island Ry. Co., Appellant, v. Knott et al.

No. 702. Knott et al., Appellants, v. Chicago, Milwaukee & St. Paul Ry. Co.

No. 703. Chicago, Milwaukee & St. Paul Ry. Co., Appellant, v. Knott et al.

No. 704. Knott et al., Appellants, v. Chicago & Alton R. R. Co.

No. 705. Chicago & Alton R. R. Co., Appellant, v. Knott et al.

STATEMENT.

The above eight appeals and eight cross-appeals abide the decision of this Honorable Court in certain others of the cases appealed involving the validity of the two-cent passenger fare and maximum freight rate laws of Missouri. For that reason, and for the purpose of simplifying the submissions as much as possible, we place all those appeals and cross-appeals which abide the result of certain other cases in this brief. The stipulations on file and the entries of the court in the record to the above effect we will set out fully in the pages following, under each respective case, to the end that these eight appeals and cross-appeals need receive no consideration, so far as the merits are concerned, at the hands of the court. The decision of the court as announced in the other cases disposing of the appeals and cross-appeals herein styled.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 676.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

NO. 677.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision in the Iron Mountain cases, Nos. 688 and 689 of the present docket of this court, and the Iron Mountain cases abide the result of the Frisco cases, Nos. 672 and 673 of the present docket, under following stipulation and record entry. (P. 125, Printed Record in this case.)

"Afterwards, to wit, on the 28th day of December, 1908, the following stipulation was filed:

UNITED STATES CIRCUIT COURT, WESTERN DIVISION, WESTERN DISTRICT OF MISSOURI.

No. 2990.

St. Louis Southwestern Ry. Co.

v.

Jos. P. Price et al.

It is agreed by and between the parties hereto that this case shall abide by the orders, judgment and decree that may be made and entered in cause No. 2996, the St. Louis, Iron Mountain & Southern Ry. Co. v. Herbert S. Hadley, Attorney-General et al.

S. H. WEST,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for Defendant."

"Afterwards, to wit, on the 28th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2990.

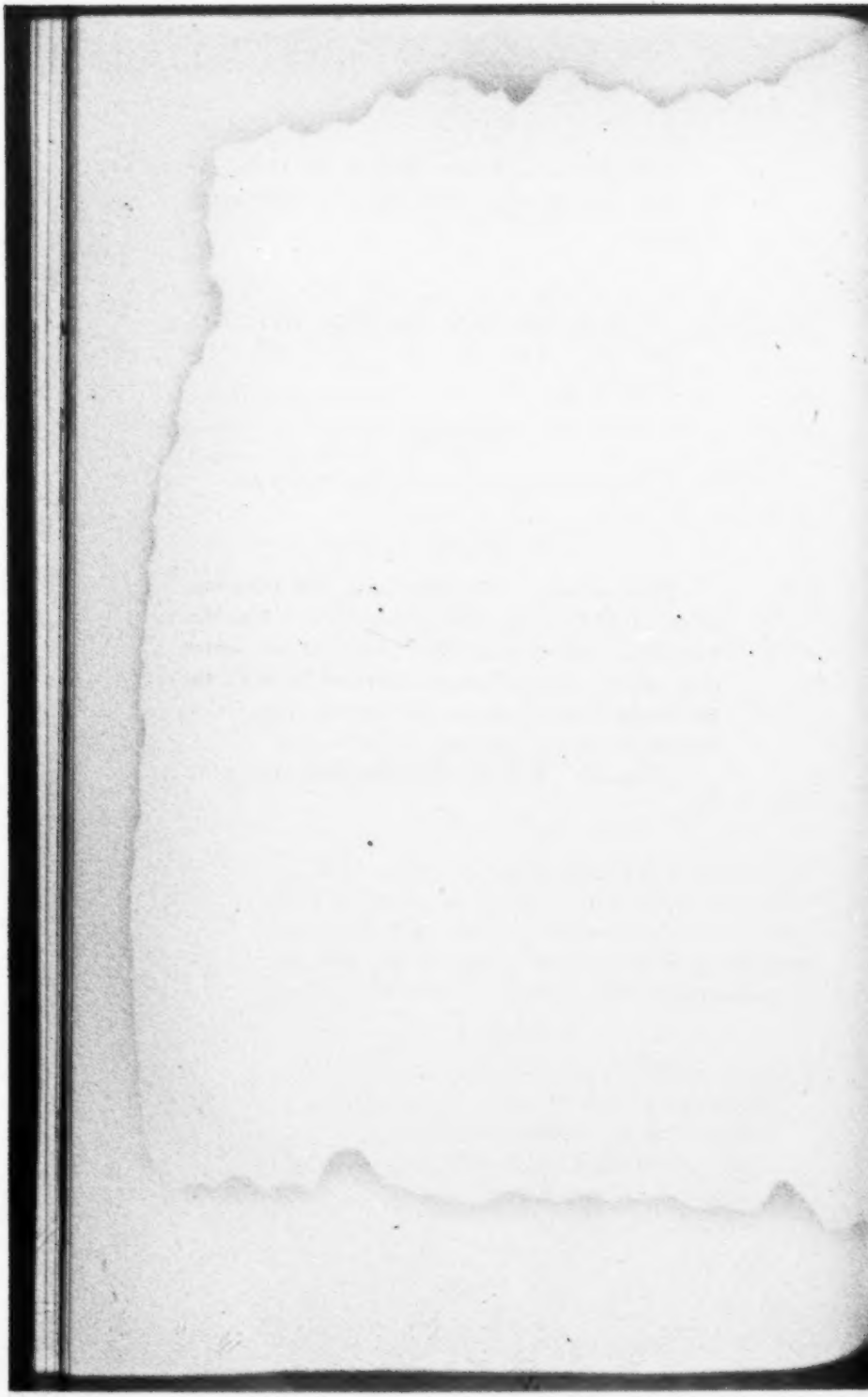
St. Louis Southwestern Railway Company

v.

Jos. P. Rice et al.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case shall abide by the orders, judgment and decree that may be made and entered in cause No. 2996, the St. Louis, Iron Mountain & Southern Ry. Co. v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, Judge."



IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 686.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE MISSOURI PACIFIC RAILWAY COMPANY.

NO. 687.

THE MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Frisco cases, Nos. 672 and 673 of the present docket, under the following stipulation and record entry. (P. 161, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, the following stipulation was filed:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2995. Equity.

Missouri Pacific Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is hereby agreed by and between the parties hereto that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 2988, St. Louis & San Francisco Railroad Company v. Herbert S. Hadley, Attorney-General et al.

MARTIN L. CLARDY,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for said Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2995. In Equity.

Missouri Pacific Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 2988, St. Louis & San Francisco Railroad Company v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, JUDGE."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 688.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

NO. 689.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Frisco cases, Nos. 672 and 673 of the present docket, under the following stipulation and record entry. (P. 154, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed.

Said stipulation is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2996. In Equity.

St. Louis, Iron Mountain & Southern Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is agreed by and between the parties hereto that this cause shall abide by the orders, judgment and decree that may be made and entered in cause

No. 2988, St. Louis & San Francisco Railroad Company v. Herbert S. Hadley, Attorney-General et al.

MARTIN L. CLARDY,
FRANK HAGERMAN,
Solicitors for Complainants."
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, an order was made and entered of record in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2996. In Equity.

St. Louis, Iron Mountain & Southern Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 2988, St. Louis & San Francisco Railroad Company v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, Judge."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 692.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY.

NO. 693.

THE QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY.

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Chicago Great Western Railway Company cases, Nos. 700 and 701 of the present docket, under the following stipulation and record entry. (P. 133, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, the following stipulation was filed:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2999. Equity.

Quincy, Omaha & Kansas City Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is agreed by and between the parties that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 3003, Chicago Great Western Railway Company v. Herbert S. Hadley, Attorney-General et al.

J. G. TRIMBLE,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 229. Equity.

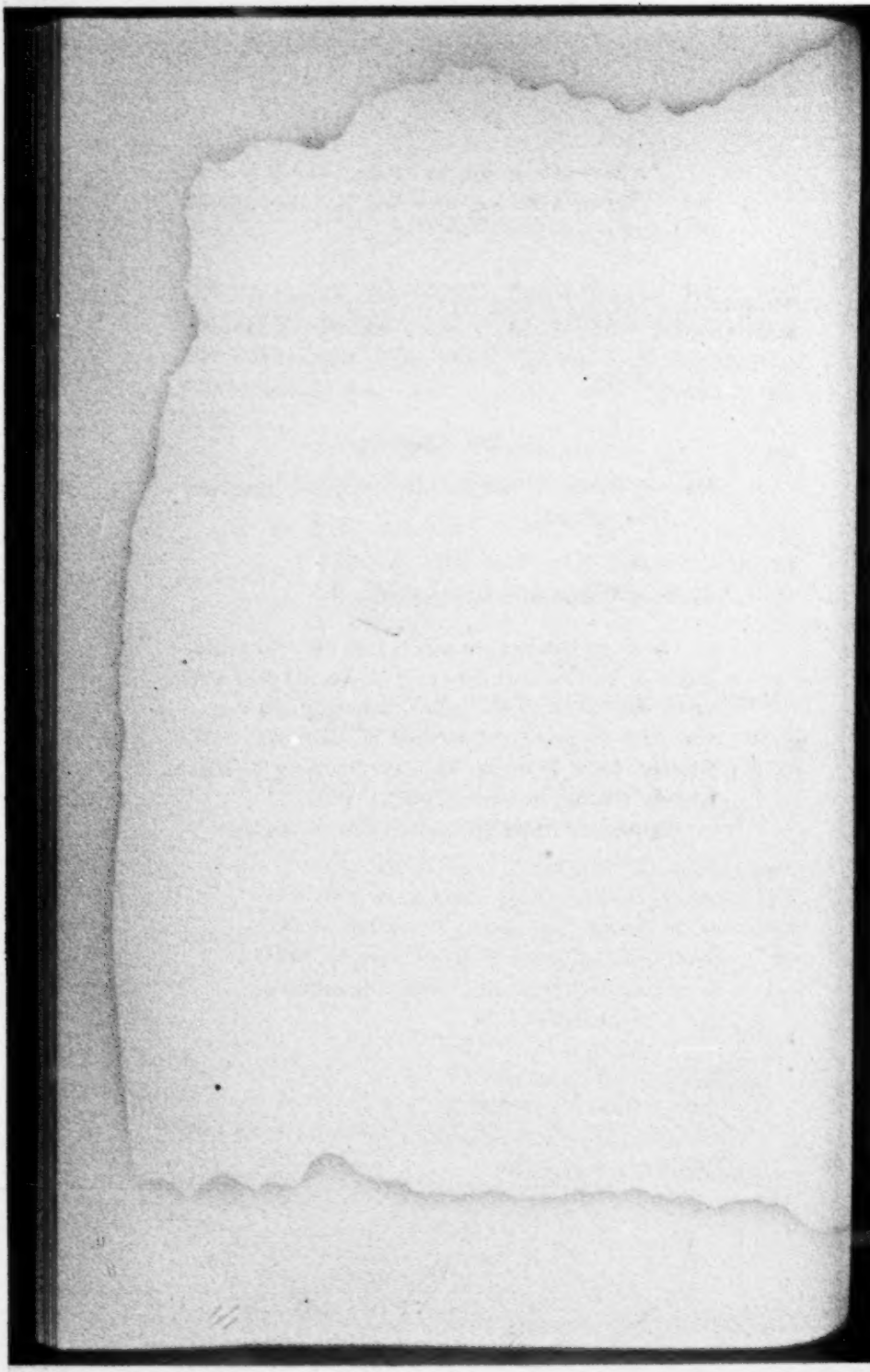
Quincy, Omaha & Kansas City Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 3003, Chicago Great Western Railway Company v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, Judge."



IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 694.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE WABASH RAILROAD COMPANY.

NO. 695.

THE WABASH RAILROAD COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Burlington cases, Nos. 130 and 134 of the present docket, under the following stipulation and record entry. (P. 129, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3000.

Wabash Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is hereby agreed that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company v. Herbert S. Hadley et al.

J. L. MINNIS,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3000.

Wabash Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company v. Herbert S. Hadley et al.

(Signed) SMITH McPHERSON, Judge."

December 29, 1908.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 696.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY.

NO. 697.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result of the Chicago Great Western Railway Company cases, Nos. 700 and 701 of the present docket, under the following stipulation and record entry. (P. 164, Printed Record in this case.

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3001.

St. Joseph & Grand Island Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is agreed by and between the parties hereto that this case shall abide by the orders, judgment and decree that may be made and entered in cause No. 3003, Chicago Great Western Railway Company v. Herbert S. Hadley, Attorney-General et al.

R. A. BROWN,
FRANK HAGERMAN,
Solicitors for Defendants.
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3001.

St. Joseph & Grand Island Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case shall abide by the orders, judgment and decree that may be made and entered in cause No. 3003, Chicago Great Western Railway Company v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, Judge."

December 29, 1908.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 702.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

NO. 703.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result of the Frisco cases, Nos. 672 and 673 of the present docket, under the following stipulation and record entry. (P. 121, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3004.

Chicago, Milwaukee & St. Paul Railway Company, Complainant,

v.

Herbert S. Hadley, Attorney-General et al., Defendants.

STIPULATION.

It is hereby stipulated that this case may abide the orders, judgments and decrees entered in case No. 2989, Atchison, Topeka & Santa Fe Ry. Co. v. Herbert S. Hadley et al.

WM. ELLIS,
FRANK HAGERMAN,
Solicitors for Complainants.
HERBERT S. HADLEY,
JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3004.

Chicago, Milwaukee & St. Paul Railway Company, Complainants,

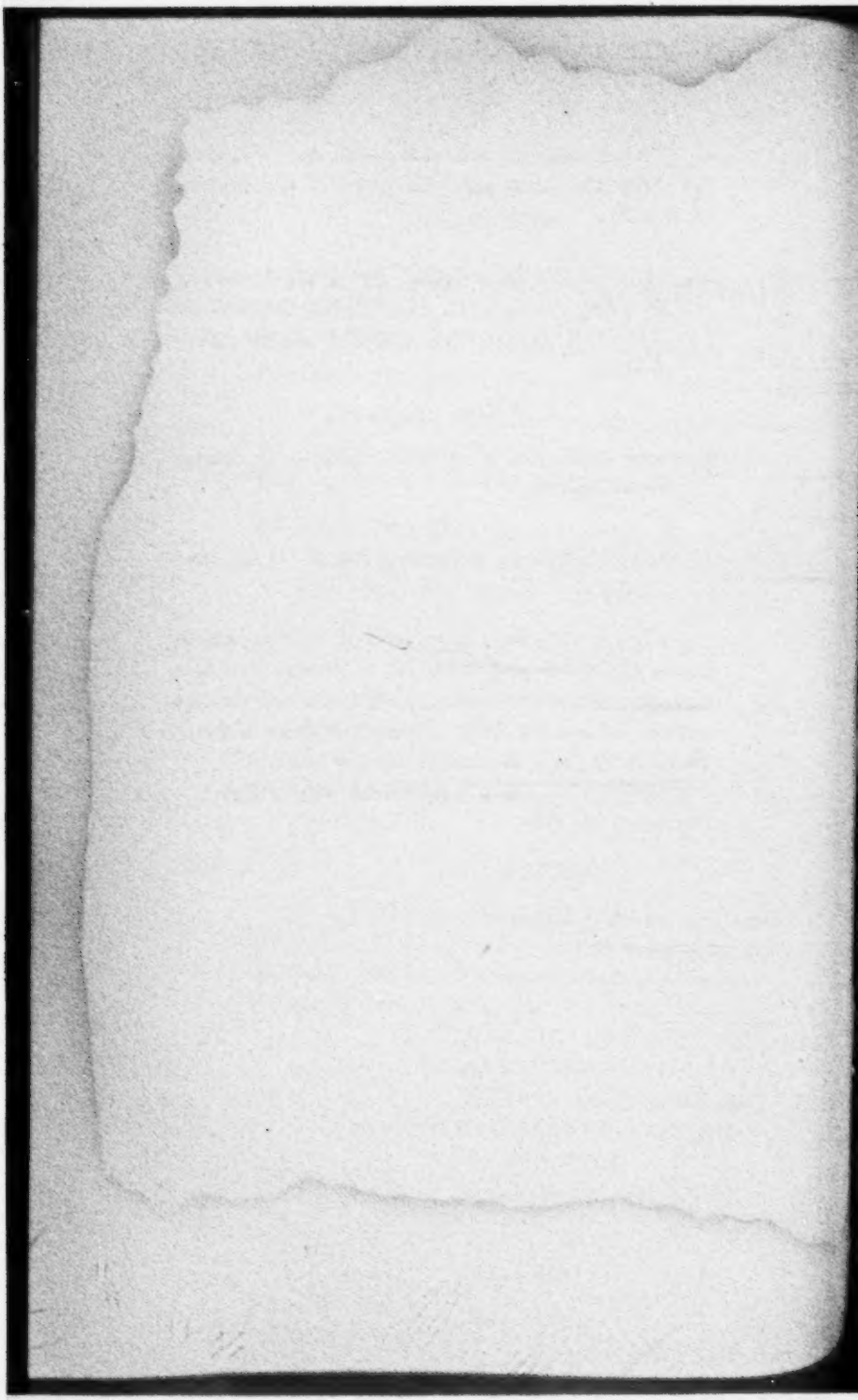
v.

Herbert S. Hadley, Attorney-General et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case may abide the orders, judgments and decrees entered in case No. 2989, Atchison, Topeka & Santa Fe Railway Co. v. Herbert S. Hadley et al.

(Signed) SMITH McPHERSON, Judge."

December 29, 1908.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 704.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE CHICAGO & ALTON RAILWAY COMPANY.

NO. 705.

THE CHICAGO & ALTON RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Burlington cases, Nos. 130 and 134 of the present docket, under the following stipulation and record entry. (P. 128, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3006.

Chicago & Alton Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is hereby agreed that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company v. Herbert S. Hadley et al.

FRANK HAGERMAN,
EDWARD L. SCARRITT,
Solicitors for Complainant.
HERBERT S. HADLEY,
JOHN KENNISH,
Solicitors for Defendant."

W. C. SCARRITT,
E. H. JONES,
Of Counsel for Complainant.

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3006.

Chicago & Alton Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company v. Herbert S. Hadley et al.

(Signed) SMITH McPHERSON, Judge."

December 29, 1908.

CONCLUSION.

The foregoing eight appeals and eight cross-appeals, under the stipulations and record entries abiding the result of certain other cases, need not be considered by the court other than to make such orders and entries in reference thereto as may be necessary under the decisions in the said cases, the results in which these appeals and cross-appeals must abide.

The decision in the Frisco cases disposes of Nos. 676 and

677, same being the St. Louis Southwestern Railway Company cases, and also disposes of the Iron Mountain cases, same being cases Nos. 688 and 689, and also disposes of the Missouri Pacific Railway cases, same being Nos. 686 and 687, and also disposes of the Chicago, Milwaukee & St. Paul Ry. Co. cases, same being Nos. 702 and 703.

The decision in the Chicago Great Western Railway Company cases, Nos. 700 and 701, disposes of the Quincy, Omaha and Kansas City Railroad Company cases, same being Nos. 692 and 693, and also disposes of the St. Joseph and Grand Island Railway Company cases, same being cases Nos. 696 and 697.

The decision in the Burlington cases, Nos. 130 and 134, disposes of the Wabash cases, Nos. 694 and 695, and also disposes of the Chicago & Alton Railway Company cases, Nos. 704 and 705.

In this way we dispose of sixteen cases, being eight appeals and eight cross-appeals.

Respectfully submitted,

ELLIOTT W. MAJOR,

Attorney-General, Attorney and Counselor for Appellants in the above appeals, and Attorney and Counselor for Appellants in the cross-appeals.

SANFORD B. LADD,

Of Counsel.

v

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 676. Knott et al., Appellants, v. St. Louis & Southwestern Ry. Co.

No. 677. St. Louis & Southwestern Ry. Co., Appellant, v. Knott et al.

No. 686. Knott et al., Appellants, v. Missouri Pacific Ry. Co.

No. 687. Missouri Pacific Ry. Co., Appellant, v. Knott et al.

No. 688. Knott et al., Appellants, v. St. Louis, Iron Mountain & Southern Ry. Co.

No. 689. St. Louis, Iron Mountain & Southern Ry. Co., Appellant, v. Knott et al.

No. 692. Knott et al., Appellants, v. Quincy, Omaha & Kansas City R. R. Co.

No. 693. Quincy, Omaha & Kansas City R. R. Co., Appellant, v. Knott et al.

No. 694. Knott et al., Appellants, v. Wabash R. R. Co.

No. 695. Wabash R. R. Co., Appellant, v. Knott et al.

No. 696. Knott et al., Appellants, v. St. Joseph & Grand Island Ry. Co.

No. 697. St. Joseph & Grand Island Ry. Co., Appellant, v. Knott et al.

No. 702. Knott et al., Appellants, v. Chicago, Milwaukee & St. Paul Ry. Co.

No. 703. Chicago, Milwaukee & St. Paul Ry. Co., Appellant, v. Knott et al.

No. 704. Knott et al., Appellants, v. Chicago & Alton R. R. Co.

No. 705. Chicago & Alton R. R. Co., Appellant, v. Knott et al.

STATEMENT.

The above eight appeals and eight cross-appeals abide the decision of this Honorable Court in certain others of the cases appealed involving the validity of the two-cent passenger fare and maximum freight rate laws of Missouri. For that reason, and for the purpose of simplifying the submissions as much as possible, we place all those appeals and cross-appeals which abide the result of certain other cases in this brief. The stipulations on file and the entries of the court in the record to the above effect we will set out fully in the pages following, under each respective case, to the end that these eight appeals and cross-appeals need receive no consideration, so far as the merits are concerned, at the hands of the court. The decision of the court as announced in the other cases disposing of the appeals and cross-appeals herein styled.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 676.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

NO. 677.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision in the Iron Mountain cases, Nos. 688 and 689 of the present docket of this court, and the Iron Mountain cases abide the result of the Frisco cases, Nos. 672 and 673 of the present docket, under following stipulation and record entry. (P. 125, Printed Record in this case.)

"Afterwards, to wit, on the 28th day of December, 1908, the following stipulation was filed:

UNITED STATES CIRCUIT COURT, WESTERN DIVISION, WESTERN DISTRICT OF MISSOURI.

No. 2990.

St. Louis Southwestern Ry. Co.

v.

Jos. P. Price et al.

It is agreed by and between the parties hereto that this case shall abide by the orders, judgment and decree that may be made and entered in cause No. 2996, the St. Louis, Iron Mountain & Southern Ry. Co. v. Herbert S. Hadley, Attorney-General et al.

S. H. WEST,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for Defendant."

"Afterwards, to wit, on the 28th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2990.

St. Louis Southwestern Railway Company

v.

Jos. P. Rice et al.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case shall abide by the orders, judgment and decree that may be made and entered in cause No. 2996, the St. Louis, Iron Mountain & Southern Ry. Co. v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, Judge."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 686.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE MISSOURI PACIFIC RAILWAY COMPANY.

NO. 687.

THE MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Frisco cases, Nos. 672 and 673 of the present docket, under the following stipulation and record entry. (P. 161, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, the following stipulation was filed:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2995. Equity.

Missouri Pacific Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is hereby agreed by and between the parties hereto that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 2988, St. Louis & San Francisco Railroad Company v. Herbert S. Hadley, Attorney-General et al.

MARTIN L. CLARDY,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for said Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2995. In Equity.

Missouri Pacific Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 2988, St. Louis & San Francisco Railroad Company v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, JUDGE."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 688.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

NO. 689.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Frisco cases, Nos. 672 and 673 of the present docket, under the following stipulation and record entry. (P. 154, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed.

Said stipulation is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2996. In Equity.

St. Louis, Iron Mountain & Southern Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is agreed by and between the parties hereto that this cause shall abide by the orders, judgment and decree that may be made and entered in cause

No. 2988, St. Louis & San Francisco Railroad Company v. Herbert S. Hadley, Attorney-General et al.

MARTIN L. CLARDY,
FRANK HAGERMAN,
Solicitors for Complainants."
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, an order was made and entered of record in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2996. In Equity.

St. Louis, Iron Mountain & Southern Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 2988, St. Louis & San Francisco Railroad Company v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, Judge."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 692.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY.

NO. 693.

THE QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY.

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Chicago Great Western Railway Company cases, Nos. 700 and 701 of the present docket, under the following stipulation and record entry. (P. 133, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, the following stipulation was filed:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 2999. Equity.

Quincy, Omaha & Kansas City Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is agreed by and between the parties that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 3003, Chicago Great Western Railway Company v. Herbert S. Hadley, Attorney-General et al.

J. G. TRIMBLE,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

No. 229. Equity.

Quincy, Omaha & Kansas City Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this cause shall abide by the orders, judgment and decree that may be made and entered in cause No. 3003, Chicago Great Western Railway Company v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, Judge."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 694.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE WABASH RAILROAD COMPANY.

NO. 695.

THE WABASH RAILROAD COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Burlington cases, Nos. 130 and 134 of the present docket, under the following stipulation and record entry. (P. 129, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3000.

Wabash Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is hereby agreed that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company v. Herbert S. Hadley et al.

J. L. MINNIS,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3000.

Wabash Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company v. Herbert S. Hadley et al.

(Signed) SMITH McPHERSON, Judge."

December 29, 1908.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 696.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY.

NO. 697.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result of the Chicago Great Western Railway Company cases, Nos. 700 and 701 of the present docket, under the following stipulation and record entry. (P. 164, Printed Record in this case.

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3001.

St. Joseph & Grand Island Railway Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is agreed by and between the parties hereto that this case shall abide by the orders, judgment and decree that may be made and entered in cause No. 3003, Chicago Great Western Railway Company v. Herbert S. Hadley, Attorney-General et al.

R. A. BROWN,
FRANK HAGERMAN,
Solicitors for Defendants.
HERBERT S. HADLEY,
Per JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3001.

St. Joseph & Grand Island Railway Company, Complainant,

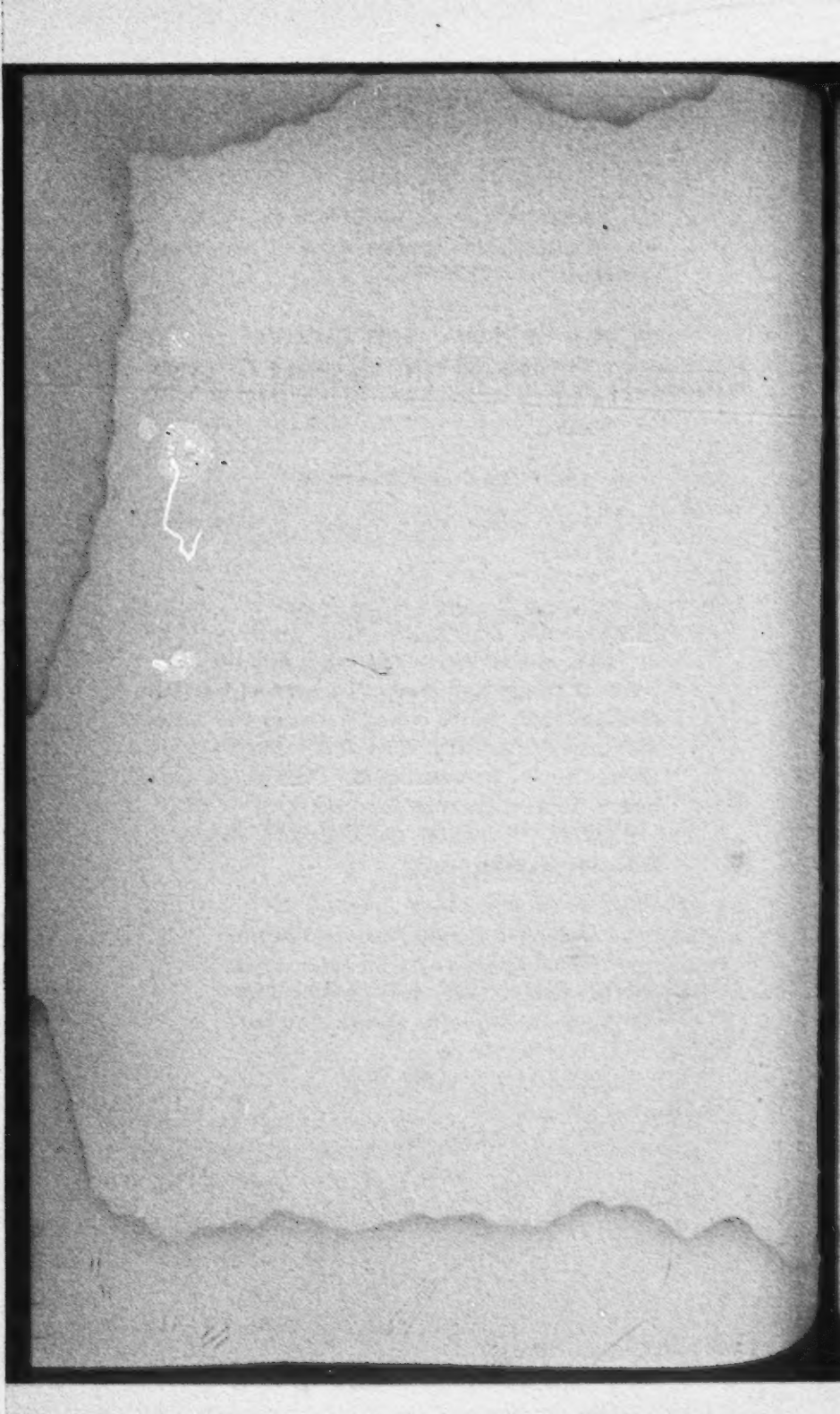
v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case shall abide by the orders, judgment and decree that may be made and entered in cause No. 3003, Chicago Great Western Railway Company v. Herbert S. Hadley, Attorney-General et al.

(Signed) SMITH McPHERSON, Judge."

December 29, 1908.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 702.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

NO. 703.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result of the Frisco cases, Nos. 672 and 673 of the present docket, under the following stipulation and record entry. (P. 121, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3004.

Chicago, Milwaukee & St. Paul Railway Company, Complainant,

v.

Herbert S. Hadley, Attorney-General et al., Defendants.

STIPULATION.

It is hereby stipulated that this case may abide the orders, judgments and decrees entered in case No. 2989, Atchison, Topeka & Santa Fe Ry. Co. v. Herbert S. Hadley et al.

WM. ELLIS,
FRANK HAGERMAN,
Solicitors for Complainants.
HERBERT S. HADLEY,
JOHN KENNISH,
Solicitors for Defendants."

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3004.

Chicago, Milwaukee & St. Paul Railway Company, Complainants,

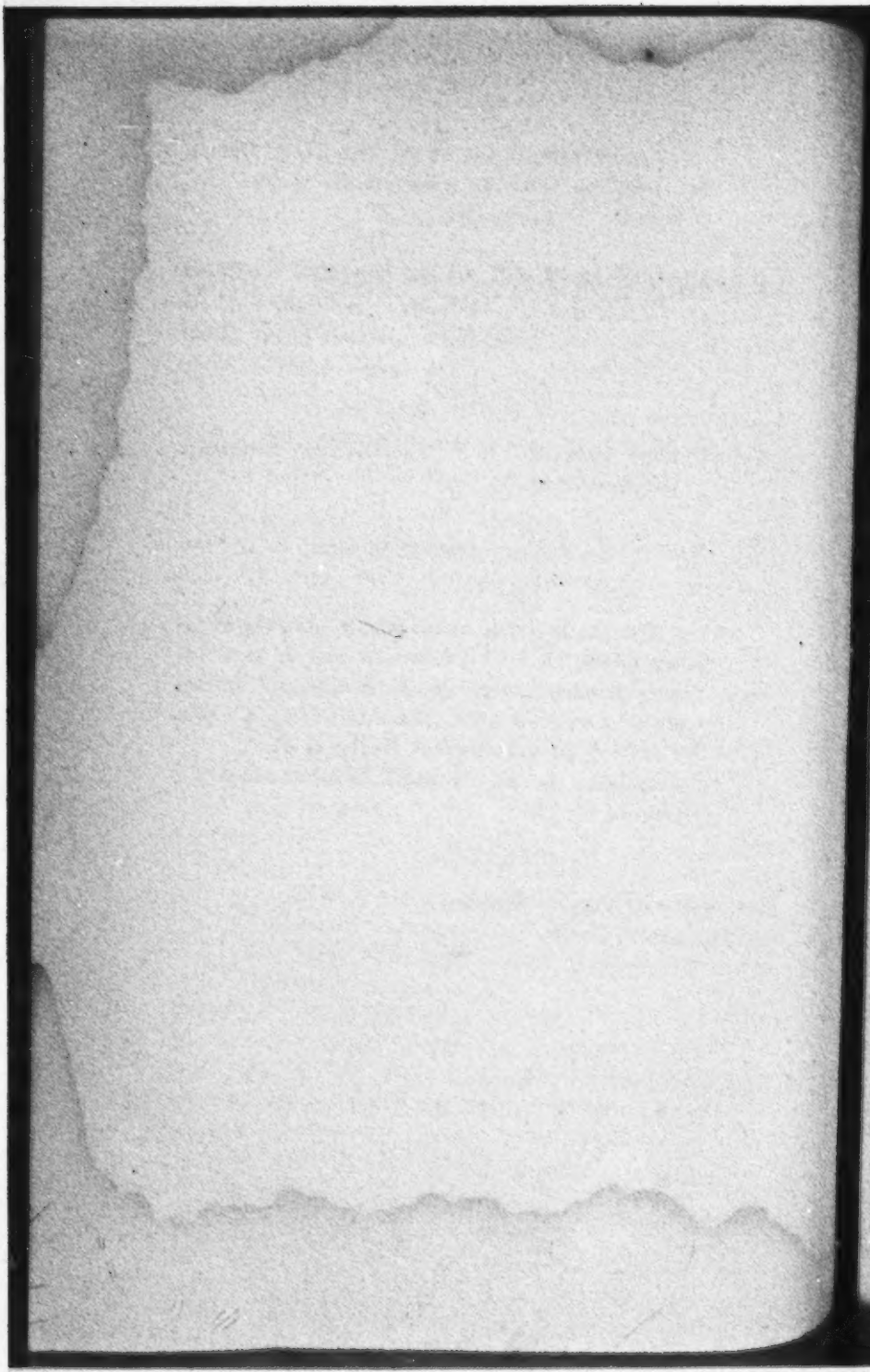
v.

Herbert S. Hadley, Attorney-General et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case may abide the orders, judgments and decrees entered in case No. 2989, Atchison, Topeka & Santa Fe Railway Co. v. Herbert S. Hadley et al.

(Signed) SMITH McPHERSON, Judge."

December 29, 1908.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 704.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

v.

THE CHICAGO & ALTON RAILWAY COMPANY.

NO. 705.

THE CHICAGO & ALTON RAILWAY COMPANY, APPELLANT,

v.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

STATEMENT.

The above appeal and cross-appeal abide the decision and result in the Burlington cases, Nos. 130 and 134 of the present docket, under the following stipulation and record entry. (P. 128, Printed Record in this case.)

"Afterwards, to wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3006.

Chicago & Alton Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

STIPULATION.

It is hereby agreed that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company v. Herbert S. Hadley et al.

FRANK HAGERMAN,
EDWARD L. SCARRITT,
Solicitors for Complainant.
HERBERT S. HADLEY,
JOHN KENNISH,
Solicitors for Defendant."

W. C. SCARRITT,
E. H. JONES,
Of Counsel for Complainant.

"Afterwards, to wit, on the 29th day of December, 1908, the following order was filed and entered of record:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

In Equity. No. 3006.

Chicago & Alton Railroad Company, Complainant,

v.

Herbert S. Hadley et al., Defendants.

Now, on this day, in accordance with the stipulation of parties filed herein, it is ordered that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company v. Herbert S. Hadley et al.

(Signed) SMITH McPHERSON, Judge."

December 29, 1908.

CONCLUSION.

The foregoing eight appeals and eight cross-appeals, under the stipulations and record entries abiding the result of certain other cases, need not be considered by the court other than to make such orders and entries in reference thereto as may be necessary under the decisions in the said cases, the results in which these appeals and cross-appeals must abide.

The decision in the Frisco cases disposes of Nos. 676 and

677, same being the St. Louis Southwestern Railway Company cases, and also disposes of the Iron Mountain cases, same being cases Nos. 688 and 689, and also disposes of the Missouri Pacific Railway cases, same being Nos. 686 and 687, and also disposes of the Chicago, Milwaukee & St. Paul Ry. Co. cases, same being Nos. 702 and 703.

The decision in the Chicago Great Western Railway Company cases, Nos. 700 and 701, disposes of the Quincy, Omaha and Kansas City Railroad Company cases, same being Nos. 692 and 693, and also disposes of the St. Joseph and Grand Island Railway Company cases, same being cases Nos. 696 and 697.

The decision in the Burlington cases, Nos. 130 and 134, disposes of the Wabash cases, Nos. 694 and 695, and also disposes of the Chicago & Alton Railway Company cases, Nos. 704 and 705.

In this way we dispose of sixteen cases, being eight appeals and eight cross-appeals.

Respectfully submitted,

ELLIOTT W. MAJOR,

Attorney-General, Attorney and Counselor for Appellants in the above appeals, and Attorney and Counselor for Appellants in the cross-appeals.

SANFORD B. LADD,

Of Counsel.